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THE ATTACHMENT OF LIFE INSURANCE POLICIES

ISADORE H. COHEN

INTRODUCTION

The exact scope of the problem which will be considered here is indicated in the following statement: *X*, a non-resident, indebted to *C*, is insured by a company subject to process in the creditor's jurisdiction. Under the terms of the policy, which is payable to *X*'s estate, *X* may, at his sole whim, election, and desire, obtain the cash value of the policy. Assuming that no exemption acts are applicable, may the cash value be attached in an action begun by *C* against *X* before *X* has made any election to get the cash value?¹

Obviously the answer to the question posed² should be found in the statute creating the process. But the attachment acts are not unique specimens of draftsmanship: like most statutes they are written distributively. For example, Field's provision³ ran merely to the effect that "the property of [the] defendant" could be "attached." Thereafter the section was altered to read that the "attachment may also be levied upon a cause of action arising upon contract; including a bond, promissory note, or other instrument for the payment of money only, whether past due, or yet to become due. . . ."⁴ Accordingly, since the answer does not appear on the face of the statute, it would have to be found by "construction"; and herein is necessarily involved judicial action.

To reveal, at the outset, the answer (it is in the negative) given by the

¹If *X* is a resident, and judgment has been obtained against him, the cash value of the policy may be reached in proceedings supplementary to execution. In those proceedings a frontal attack on the "personal" nature of the debtor's power to reach the cash value is obviated by the *in personam* decree rendered in execution proceedings. See Cohen, *Collection of Money Judgments in New York: Third Party Orders* (1935) 35 Col. L. Rev. 1196, 1236 *et seq.*; also, *Execution Process and Life Insurance* (1939) 39 Col. L. Rev. 139, 144, 162-163.

²The "question" as thus posed obviously avoids the problem raised in most policies where there is a designated beneficiary with power reserved to the insured-debtor to change the beneficiary and obtain the cash value. But even if the answer to the problem posed in this paper should have been stated in the affirmative it is difficult to believe it could have been extended to "beneficiary" policies; such a result would mean that "beneficiary" policies could be reached by provisional process, where the debtor is a non-resident, and yet the same policies would be exempt from execution under the usual insurance exemptive statute (*e.g.* Section 166 of the New York Insurance Law). Such a situation is simply unbelievable. If any creditor should have the temerity to raise the point in attachment proceedings the indicated judicial answer seems obvious. As to this, see the discussion *infra*, at pp. 232, 239.

³N. Y. Laws 1849, c. 438, § 227. This part of Field's Code was not favored with any comment by the Commissioner.

⁴N. Y. CIV. PROC. ACT (Cahill, 1939) § 916. This was also the version of the N. Y. CODE CIV. PROC. ANN. (Bliss, 1913) § 638. It found its genesis in the Throop Revision [N. Y. CODE CIV. PROC. (Throop, 1877) § 648].

American courts to the problem will in no way detract from the point of the following discussion: judicial apologetics for the given solution is professedly anchored in the statute. But the practical result is a stultification of creditors' rights. Concededly, power was vested in the courts to have reached a different result.⁵ And no legal justification can be found in the debtor's relations with his insurance for the absolution judicially decreed: the debtor, in the cash value, has a fund which should be applied to his debt, and would have been so treated were it found in the form of a bank account or broker's balance.⁶

Accordingly it is not unfair to look for the "real" reasons behind the judicial behavior in matters outside the statute. Merely to ascribe the result to judicial error is too glib; the position has been too long maintained for such description to be proper. It may be due to an intentional desire to impede the creditor's drive against his debtor's insurance.⁷ Certainly, whatever may have been the judicial motivation, the end result is not a happy one for the creditor: since jurisdiction *in personam* is impossible and jurisdiction *in rem* denied, there is no effective remedy.

From another angle the forces which operate on our little problem may assume a bolder significance. The locale is American; the time, the present. And, as everyone knows the larger forces at play on the scene exert their various pressures on private property.⁸ For the creditor, and his attorney, viewing the problem from a collection point of view, private property is mostly fluid, *i.e.*, "intangible." Thus the great array of ancient procedures and devices erected to contend with physical items have lost most of their usefulness.⁹ Protection of the creditor's property—his claim against his debtor—depends on the effective content given to procedural methods devised to cope with intangibles. Conversely, the absence of workable devices, or the failure of the courts to implement procedures already existing, to reach a debtor's intangibles represent a loss to the creditor: in his view, a

⁵Cf. *Industrial Loan and Investment Co. v. Mo. State Life Ins. Co.*, 222 Mo. App. 1228, 3 S. W. (2d) 1046 (1928).

⁶See authorities cited in note 1, *supra*.

⁷This conclusion does not seem inappropriate if the judicial labours are to be deemed a measure of judicial intention.

⁸The writer does not believe that the problem here considered—*i.e.*, one of the phases of collection "law"—can be considered as a matter apart from the general scene in which it is found. Such an analysis is too sterile, and forecloses a complete grasp of essentials. The overall picture today includes the general conflict of capitalist democracy [*Vide*, LASKI, *WHERE DO WE GO FROM HERE* (Viking, 1940)]. A discussion of the collection of debts requires an understanding of one of the struggles in that major field. The struggle is just as real as that going on in the labour phase. Indeed the decisions of the judges almost uniformly favoring the debtor group may be considered as a resultant of the political power of the group: judges stand for election in America. I use the word "may" advisedly in view of the mixed nature of the forces involved.

⁹See Cohen, *Collection of Money Judgments in New York: Supplementary Proceedings* (1935) 35 *COL. L. REV.* 1007, 1009 *et seq.*

breakdown of the protections professedly afforded "private property" (his property). And viewed from the institutional angle of insurance, and bearing in mind the tremendous mass of wealth located there, a prohibition to creditors against trespassing correspondingly decreases the ultimate value of their claims.

Whatever may be the "real" reason for judicial behavior as here revealed one cannot miss the trend of the times. From the vantage point of the insurance company there can be discerned a tremendous emphasis on a protective service. When the life insurance contract is ultimately fulfilled it works itself out in the protection of a person from the outside world, thus satisfying the insured's desire to protect the beneficiary from starvation. The allaying of this mass fear has strange overtones and awakens old memories: the unusual voluntary self-taxation, insofar as it withdraws funds which could be ventured in private enterprise now, seems to run furiously towards mass proletarianization; and the fervent desire for protection has a vague flavor of feudal homage.

Perhaps it was to have been expected that the American judges should have been affected by the upsurging mass desire for the protection represented by insurance. But it is not without point that, having been caught in this current they have failed to perform their duly appointed jobs: to protect private property. If there is any irony in this, it will be for some future Maitland to report. From our point of view, debts should be paid; and it is with that bias that the following is written.

I. "DEBT" AS A PREREQUISITE

Any lawyer knows that a life insurance policy may represent many varied rights, powers, privileges and immunities in the insured. If the policy is a "straight life" payable to the insured or his estate *X* may be entitled, *inter alia*, to have the face amount paid to his personal representative after his death, or to take the cash value during his life. In order to obtain the cash value *X* must notify the company of his intention. This is spoken of as an "election." The word indicates, largely, the relations existing between *X* and the company. *X*, under the contract and the usual statute, is absolutely entitled to the cash value when he desires to obtain it. Practically, the company always stands indebted to *X* in the amount of the cash value. *X* has the power to compel payment by making his "election"—merely his say so—his direction to "pay me." When divorced from the legal plane *X* is always considered the company's creditor to the extent of the cash value. That may be listed by him as an "asset." Naturally the company so considers it, for it lists, among its liabilities, reserves sufficient

to cover the cash values of the policies on which it is obligated.¹⁰

Practice requires *X* to "surrender" his policy when he takes its cash value. This merely means that *X* turns the policy in to the company. It has no significance as far as creating the "debt." Nor is the surrender of any importance to the company. If *X* had lost his policy he could have a new one issued in its stead. And, unless the company has notice of attaching equities of a third person, payment to *X* is sufficient to discharge it of all obligations.¹¹

Such is the practice. Legally the situation is embraced in the following conception. The company is deemed to be continuously making an irrevocable "offer" to *X* to pay him the amount of his cash value. This can be "accepted" by *X* only by "complying with the terms" of his policy—that is, by making an election, serving it on the company, and "surrendering" his insurance policy. Then a "debt" arises in *X*'s favor from the company for the amount of the cash value. If the company failed to pay, *X* could sue them, but not before.¹²

Now, as we have said before, attachment, garnishment, and their variants all apply to "debts."^{12a} In other words, if the legal plane be followed they become effective to reach intangibles due the debtor only if he could have sued the third person and recovered. So, if the attachment or garnishment is levied on an insurance company before the debtor has "elected" it follows—quite simply—that there is no "debt" to which the process may attach.

If it were not for the fact that some courts have consistently followed the conception just described, one would dismiss it as an over-ripe example of legal cloisterism. But, in *Van Dyke Company v. Moll*,¹³ *Bethards v.*

¹⁰See the balance sheets of the companies as reported to the New York Superintendent of Insurance; for a specific illustration, the report of the New York Life Insurance Company, found in N. Y. LEG. DOC. (1934) No. 34, vol. 2, p. 197. See also, N. Y. INSURANCE LAW § 84.

¹¹*Schade v. Western Union Life Ins. Co.*, 125 Wash. 200, 215 Pac. 521 (1923) (policy on life of *X* for the benefit of *Y* [wife]; power to change beneficiary reserved to *X*; *X* makes a "gift" of policy to *Y*; later, unknown to *Y*, *X* uses policy as a collateral for a bank loan. *Y* did not notify the insurer of the "gift." Held: the pledgee takes as against her on *X*'s death). See Cohen, *Creditors' Rights to Insurance Proceeds As Determined By Premium Payments* (1940) 40 Col. L. Rev. 975, 1001 *et seq.*

¹²*Van Dyke Co. v. Moll*, 241 Mich. 255, 217 N. W. 29, 57 A. L. R. 692, 695 (1928).

^{12a}See, *e.g.*, the "general" rule set out in 4 AM. JUR. § 217, p. 691 to the effect that "purely personal" privileges, since they are not property, cannot be attached. In accord with this "rule," the statutory right of redemption or possession after foreclosure is not attachable, being a "mere personal right." *Id.* at § 219. It is not intended here to quarrel with the rule: only with the classification of what is "purely personal" and what not. With the great change which has taken place in business forms the test should be simply money value. If the "thing" sought to be attached is worth something in money it should be subject to process. "Purely personal" privileges should include such things as the ordinary meaning of the words indicates: *e.g.*, kissing one's wife, or other more intimate relationships of a personal nature.

¹³*Supra* note 12.

Metropolitan Life Insurance Company,¹⁴ *Larson v. McCormack*,¹⁵ *Farmers and Merchants' Bank v. National Life Insurance Company*¹⁶ and *First National Bank of Burkburnett v. Friend*¹⁷—all fairly recent cases—that precise conception was used by the courts in all seriousness to stultify creditors' efforts to reach cash surrender values of their debtors' insurance. And even in *Ellison v. Straw*¹⁸ a good court bowed to this idea when it evaded the argument of "no election—no debt" by showing that the trial court had found that *X* had made such an election—certainly no brave way for the court to talk.

The basis of these decisions is, of course, the fact that garnishment and attachment apply only to "debts"; *i.e.*—moneys presently due and owing. *Ergo*, where "something remains to be done" by *X* before the insurance company will be "indebted" to him, then there can be no "debt." Clearly there would be no argument if the syllogism were correctly applied. For example, if *X* had agreed to build a house for *Y* and *Y* had promised to pay *X* when the house was completed, no debt would exist until *X* performed his part of the contract. But in the usual insurance case the debt always exists: it is only *X*'s desire to get payment which has not been expressed by affirmative action. That desire—the "election"—is conceived of as something "personal" to *X*, which may not be exercised by anyone other than *X* himself. Since, in the typical debtor-creditor set-up, such an election would never be exercised by *X* because it would be against his interest, this ideology would have the creditor's remedy determined by an accidental factor: the chance that *X* may have "exercised his election," without being aware that the creditor was proceeding against the insurance.

Now, were the conceptions followed undeviatingly, or were they based on reasons deemed so compelling that universal application simply had to follow, perhaps one could not quarrel with the decisions just mentioned. However, both have given way where the ends of justice so required. For instance, garnishment and attachment will issue as against a debt due from a third party even where the debtor has assigned his claim, if that was done

¹⁴287 Ill. App. 7, 4 N. E. (2d) 257 (1936), note (1937) 25 ILL. B. J. 202.

¹⁵286 Ill. App. 206, 2 N. E. (2d) 974 (1936).

¹⁶161 Ga. 793, 131 S. E. 902, 44 A. L. R. 1184, 1188 (1926).

¹⁷23 S. W. (2d) 482 (Tex. Civ. App. 1929). The Missouri Court of Appeals in 1928, in *Industrial Loan and Investment Co. v. Mo. State Life Ins. Co.*, *supra* note 5, explained these decisions by saying that the first American case, *Columbia Bank v. Equitable Life Assurance Society*, *infra* note 55, was the result of a special New York statute and that all the subsequent cases were blindly patterned on that decision regardless of the local statute. It may be regarded as curious that the special Missouri act which was so heavily relied on to reach this conclusion was also a part of the New York Code. The New York bench, apparently, could not sense its distinction.

¹⁸119 Wis. 502, 97 N. W. 168 (1903).

fraudulently to avoid paying creditors.¹⁹ The precise statement itself indicates the contradiction between the facts and the legal idea. If *P* is indebted to *X*, *X* has complete power of disposition. If he transfers the claim to *Q*, *P* is no longer indebted to *X*, but to *Q*. Our legal category which fits into the writs of garnishment and attachment only "debts" due to the execution or attachment debtor should deny the effective operation of the process here: for no one is indebted to *X*.

And yet the writs are permitted to issue here *when X has transferred the claim in fraud of creditors*. This is done out of a practical awareness of the habits and characteristics of the fraudulent debtor. Theoretically the writs should not issue, and the creditor ought to be relegated to a fraudulent transfer action before the writs could apply. The theory of such an action is to retransfer the debt back to *X* so that then the writs may issue. This results in a great duplication of actions and energy, operates greatly to delay the creditor, and often render effective collection impossible.

There is, in such cases, every reason of convenience and policy for permitting the issuance of the writs even though there is no "debt" when the writs are granted. Justification is found in the conception that *X* really is the owner of the "debt" as far as his creditors are concerned and it will be considered as "due" to him so as to permit the service of the writs, subject to the condition subsequent that the creditor really prove that *A* made the transfer with evil in his heart. Of course this is not so. *X* had the power to transfer this claim: if *he* sued thereon he could not recover; nor could his personal representatives after his death, unless a special statute gave them power to do so on behalf of his creditors.²⁰ No one could possibly quarrel with the result even though the legal theory is not homologous with the surrounding ideology. As a practical matter it works, and that is far better than an abstraction of adorable symmetry that would operate imperfectly if allowed to govern decision in practical problems.

Here, then, we find an instance where theory has given way to practical necessity. Where theory was deemed by the court so rigid as to forbid any bending, the legislature had to step in and supply the necessary amendment. In Canada this was done with respect to garnishee orders;²¹ in some of the American states as to execution orders.²² Proof, not of the absence

¹⁹*Attachment*: see, e.g., N. Y. DEBTOR AND CREDITOR LAW § 278, *Farlee v. Farlee*, 134 Misc. 275, 235 N. Y. Supp. 239 (Sup. Ct. 1929).

Garnishment: see, e.g., *Coosa Land Co. v. Stradford*, 224 Ala. 511, 140 So. 582 (1932).

²⁰For example: N. Y. PERS. PROP. LAW § 19.

²¹The Canadian statute is discussed in Cohen, *Collection of Money Judgments in New York: Third Party Orders* (1935) 35 COL. L. REV. 1196, 1232-1233.

²²See Cohen, *Collection of Money Judgments: Experimentation with Supplementary Proceedings* (1936) 36 COL. L. REV. 1061, 1087-1097.

of judicial power to do the same thing, but of judicial sterility and lag. In New York the same lag obtains with respect to third party orders with the result that creditor collection is decidedly ineffective and will remain so until the legislature supplies the necessary verbal mucilage.²³

Conceivably, it can be argued that the example just elaborated does not supply any substantial basis for the argument that the issuance of garnishment or attachment should be deemed to be the exercise of the "election" required in the usual insurance policy. But this is not fundamental. It is a matter of words. And semantics, while a proper field for exercising ingenuity to devise clarity, should not be permitted to interfere with the solution of practical problems. For example, assume that *P* is indebted to *X* and *X*'s creditor has "attached" *P*'s debt. Why can't *X* assign, thereafter, to *Q* and still stultify the creditor? The answer is, he can. But, to permit that would make attachment a futile process. Therefore the courts give the writ a special content and say that with its levy there is created a "lien" on the "debt" which simply insulates it from any further action by either *X* or *P* until judicial order in the premises.²⁴ Now this is just a matter of judicial masonry to make the process work. Merely because we have become accustomed when talking about "attachment" of debts to develop a mental image of the physical grabbing of some definite thing by human hands should not blind us to the fact that this picture is just a mental conception, that the thing which is grabbed is not a thing, does not have physical existence in space, and that the attachment of intangibles seizes nothing. Its effectiveness has depended upon another conception—"lien"—which is merely judicial palaver to explain that *X*'s subsequent dealing with that particular asset will not be permitted, even at the expense of the fair-haired boy of the law—the innocent purchaser for value.

In implementing this conception some courts speak of the attachment as operating like an "assignment" to the creditor. This, too, is pure logomachy, and merely designed to achieve the same ends. The reason the "assignment" idea was not resorted to more often was the fact that the "lien" conception had achieved the greater popularity and accomplished the same purpose. But, inevitably, it operated to deprive *X* of power to deal with the asset in question. The principle on which this was founded could, with no greater effort, be deemed to transfer from *X* to his creditors or the court power to deal affirmatively with the asset. Thus, if the attachment has the effect of an "assignment" then the creditor should be permitted as an "assignee" to exercise the power of "election" which was vested in the attachment debtor.

²³Cohen, *supra* note 21, at 1227 *et seq.*

²⁴*Cf.* Korytkowski v. Greniewicki, 220 App. Div. 237, 221 N. Y. Supp. 119 (4th Dep't 1927); and see Tapp v. Jones (Pooley, Garnishee), 23 W. R. 694 (1875).

Now this is merely submitted as an outline of wordplay and ideamongering to achieve one function: to make attachment process effective to reach cash values of insurance policies. It can be achieved in another way. Cash value is an institutional conception supposed to represent, in the insurance business, the excess of premiums paid during a period of years, over the actual premium cost necessary to carry the risk of insurance. That excess really amounts to a "deposit" of funds with the company. This is no different from a deposit with a savings bank. In the latter case withdrawal is permitted only when the depositor brings in his passbook and signs a withdrawal ticket—his "election" to take the cash. Now this has never been deemed a necessary prerequisite before the "debt" will be created so as to permit attachment to lie. Why? The answer is, apparently, that no one ever thought of it, or thinking of it, hadn't much faith in judicial acceptance of such palaver. And yet the insurance analogue is quite parallel: The surrender of the policy and the "election" to take the cash value are exactly the same as the surrender of the passbook and the election to withdraw the funds in the savings account.

Of course, what happens here is that, by saying that an insurance company is a savings bank we soft-pedal the necessity for an "election" because in bank accounts that argument was never adopted, although it could have been. That is not the only way we can achieve the identical result. We can, for example, simply say that although *X* is barred from collecting his deposit account with his bank or taking his cash value on his insurance, until he complies with the rules binding *him*, nevertheless such rules do not bind his attachment creditor. That was what the court did in *Maloney v. Casey*,²⁵ where the creditor attached the debtor's bank account by trustee process. This account was maintained under the customary regulation that "no payment will be made without the presentation of the deposit book." The bank argued that the plaintiff just had to get the book. The court didn't take to that argument, explaining that:²⁶

" . . . the statutes on trustee process plainly intend that credits in savings banks shall be subject to attachment by that process. These statutes have made no provision for compelling the principal defendant to surrender his deposit-book, and without such compulsion the plaintiff usually could not obtain the book. The credits are attached and applied to the payment of the defendant's debt to the plaintiff, against the will

²⁵164 Mass. 124, 41 N. E. 104 (1895). While talking about the similarity—for our purpose—of savings accounts and cash values, consider an "option": it is paid-for power to make an election to purchase *someone else's* property—which, as everyone will concede, is a little more remote than the power reserved to an insured to obtain the cash surrender value of his own policy. *Nevertheless the option is attachable*: *Stagg v. British Controlled Oilfield, Ltd.*, 117 Misc. 474, 192 N. Y. Supp. 596 (Sup. Ct. 1921).

²⁶See 164 Mass. 124, 126, 41 N. E. 104, 105 (1895).

of the defendant, and it has not been made a condition of the attachment that the plaintiff shall conform, in bringing his action, to all the rules which the defendant is required to observe before he can bring an action against the bank. The plaintiff in trustee process, where the depositor is the principal defendant, is not required to give the notice which the depositor is often required to give before he can demand payment of the bank. It is for the Legislature to say on what terms trustee process shall be maintained to reach the creditors of the principal defendant, and the rules of the bank are not regarded as essential conditions, on a compliance with which the indebtedness of the bank to the depositor necessarily depends. We are of opinion that the statutes do not make the liability of the bank to be charged as trustee depend upon the plaintiff's complying with the rules of the bank, which were intended to regulate the conduct of a depositor in his relations with the bank."

II. THE "PERSONAL" NATURE OF THE "ELECTION" AS A CONCEPTION BARRING EFFECTIVE CREDITOR PROCESS

The other conception which has been used by the courts in paralyzing provisional remedies where cash surrender values were concerned is the picture of the insured's "election" as something curiously close and personal to him alone: the idea is reminiscent of feudal homage. Yet the election is often exercised by persons other than the insured: for example, in proceedings supplementary to execution. These proceedings, being a codification of the old judgment-creditor's bill, had such theoretical content as to give the court power to act *in personam* and thus to compel the debtor to perform specific acts. So a debtor could be compelled to "elect" to take the cash surrender values of his policies and no question was raised about the "personal" relationship of the election to the debtor.²⁷ That was, presumably, because he actually did "elect." Of course, that was plain treachery. The "election" was about as willing as force could make it: no more, no less. If the debtor would not "elect" he stayed in jail until he did; greater duress could not be imagined. As a matter of fact, today, some codes—to avoid the messy business of jail—simply provide that if the debtor won't perform the commanded act, then the court will direct the sheriff to perform it for him.²⁸ All of which comes down to the fact that in proceedings to collect on a judgment the court will exercise the "election" and the sacred personal nature of the relationship is just not mentioned: obviously, a proper way to act, otherwise creditors could not realize on their debtors' assets.

Nor will the "personal" nature of the power to elect prevent the power

²⁷Cohen, *supra* note 21, at 1241 *et seq.*

²⁸See, *e.g.*, FED. RULES CIV. PROC., Rule 70.

from passing to a trustee in bankruptcy; but that, since it is established by statute,²⁹ is, perhaps, not a proper example here. It does indicate that there is nothing in the *nature* of the power to prevent its transference and exercise by persons other than the insured. If it may be so transferred by statute, it ought to be transferable by the issuance of a provisional remedy, like attachment. However, investigation discloses that the conception of the "election" as something peculiar to *X* is one that has, apparently, greatly bedevilled the courts in the insurance cases. If logically adhered to, it would operate to *X*'s prejudice, as, for example, if he became insane. Yet in such a case, as was pointed out in *Pendas v. Equitable Life Assurance Society*,³⁰ the election would be made for *X* by another person. This person may be either *X*'s guardian or committee, or the chancellor. This works out as follows: *X*'s guardian makes the "election." This, however, is not effective to "bind" the company until the chancellor has approved. The reason, quite properly, is to afford some unbiassed agency an opportunity to supervise, make an inquiry into the facts, and decide what action is most advantageous to *X*. Obviously the inevitable agency is the chancellor, whose concern for lunatics is an ancient matter. The chancellor may approve the guardian's choice, or reprove him, and make an independent selection.³¹ Theoretically, *X* makes the choice through his guardian. However that may be, the net result is the making of the election by a person other than *X*.³²

This seems quite clear and obvious. Nevertheless, even here the reports

²⁹30 Stat. 565 (1898), 11 U. S. C. A. § 110 (1937).

³⁰129 Fla. 253, 176 So. 104 (1937).

³¹The same procedure is followed when an incompetent "desires" to change the beneficiary designation in his policies. *Matter of Degnan*, 122 N. J. Eq. 470, 194 Atl. 789 (1938); *cf. Kay v. Erickson*, 209 Wis. 147, 244 N. W. 625 (1932). See on this general subject, Note, *Power of guardian or committee of incompetent in respect to insurance on ward's life, or of policy under which he has interest* (1933) 84 A. L. R. 366-370. For a comparable set-up: *X* dies leaving property devised by will. Spouse *Y* has, under statute, power to take under will or "renounce" and take statutory share. If *Y* is insane the "election" is made by the chancellor. *First Nat. Bank of St. Petersburg v. MacDonald*, 100 Fla. 675, 130 So. 596 (1930); *Ambrose v. Rugg*, 123 Ohio St. 433, 175 N. E. 691 (1931). See Note, *Election on behalf of incompetent to take under or against will* (1931) 74 A. L. R. 452.

³²The surrender for cash value by an incompetent may involve the company in difficulties. In *Hicks v. Northwestern Mutual Insurance Co.*, 166 Ia. 532, 147 N. W. 883, L. R. A. 1915A 872 (1914), and in *Knoche v. Mutual Life Ins. Co. of N. Y.*, 317 Pa. 370, 176 Atl. 230 (1934), that occurred. In both cases the wives were named beneficiaries. In both they joined in the surrender; in both they sued the company for the insurance on *X*'s death. In the *Hicks* case *X* had a reserved power to change the beneficiary; in the *Knoche* case the interest of the wife was vested. The respective courts seized on this fact to render different results. Since *Y* had no interest in the *Hicks* case, her consent to the surrender could not estop her from suing for the benefit of *X*'s estate. *X* was the owner of the policy; ergo, judgment for *X*. In the *Knoche* case the wife, being the owner under the vested interest rule, had, by joining in the surrender destroyed the policy; *X*'s consent was, apparently, unnecessary. The cases throw a sharp light on the wierd nature of the "exemption" created by the various protective statutes, as interpreted by the courts, when *X*'s creditors are at the bar.

contain fantasies. For example, *Matter of Wainman's Estate*.³³ There X, while sound, had insured his life, naming his wife as beneficiary, and reserved the power to change the beneficiary. X became insane. His committee wanted to surrender the policy so that they could get the cash value; otherwise X's estate would become insolvent. The mechanics of the procedure involved were simple: the exercise of X's power to get the cash value by the court (since X was insane). That the court had such power is obvious. Yet the application was denied. Nor was it denied on the wife's plea that she owned the policy and paid all premiums. It was rejected on the grounds that (1) the committee had no power to change the beneficiary and (2) that under the New York exemption act the wife got a vested interest on the issuance of the policy. That being so, argued the court, X couldn't surrender the policy while competent without his wife's consent; therefore the committee could not do it, either, without her compliance. This, of course, is simply legal tripe. The wife's interest was not vested and X could have surrendered the policy while competent without her consent—he had the reserved power to strike out her interest at will. There was no question about the committee's power to surrender: conceding their inability nevertheless, the court did have the power to exercise the election for X, if it were to his advantage.

The cases construing the effect of an assignment for the benefit of creditors offer an alluring opportunity to dissect the conception of intimacy thought to inhere in the insured's power to "elect." Common sense requires that if the debtor is carrying an insurance policy under which he can get a cash value, his assignee should be able to exercise that power: otherwise the creditors will lose a juicy asset. In *Blinn v. Dame*,³⁴ X assigned all his property for the benefit of creditors and agreed to execute such documents as would enable the assets to "vest" in the assignee. X carried a policy payable to his children wherein he had the power to surrender for cash value. The cash value was held to be covered by the assignment and X was compelled to make the "election" necessary to enable the assignee to get the cash value: a commendable result. Nothing was said in that case about the personal, intimate connection between X and his election.

Townsend's Assignee v. Townsend,³⁵ however, reaches the contrary result, and, in doing so, indicates the factors which originally may have given content to the "personal nature of the election" conception. There X carried insurance for the benefit of his wife and children. The policy was issued before the companies included in their contracts power in the insured

³³121 Misc. 318, 200 N. Y. Supp. 893 (Sup. Ct. 1923).

³⁴207 Mass. 159, 93 N. E. 601, 20 Ann. Cas. 1184, 1186 (1911).

³⁵127 Ky. 230, 105 S. W. 937, 16 L. R. A. (N. S.) 316 (1907).

to change the beneficiary. *X* did, however, have the power to surrender the policy for its cash value. And, as far as creditors of *X* were concerned, the policy was exempt from his debts. When *X* assigned for the benefit of creditors it was worth about \$6,000—a considerable sum. The assignee was denied the power to get this cash value. In reaching this conclusion the court conceived the beneficiaries' interests as vested, subject to be defeated by *X*'s election to take the cash value. As "parties" to the contract they could insist that the power of defeasance be exercised exactly as fixed in the contract—by *X* alone. Life insurance is primarily devoted for the benefit of the family of the insured. *X*'s relationship to his family is so personal that only he can exercise the power to surrender. No one could love his wife and children as he does. Therefore the old rule stated by Sugden applied, namely, that "one vested with a power, to be exercised on behalf of or against another party to the instrument creating it, must exercise it in person and may not delegate it to another."

Blinn v. Dame and *Townsend v. Townsend* are exactly alike on their facts. The conclusions are different because the respective courts placed different values on different social conflicts. The Massachusetts court felt that the interests of creditors outweighed the interests of the family, championed by the Kentucky bench. This view is verified by the opinion of the dissenters in the *Townsend* case, expressed in a logical essay showing that the cash value was property which passed with the assignment. So we see that the boudoir nature of the power to elect was concocted as an excuse to justify the sterilizing of creditors' demands against cash surrender values. The Kentucky court had no objection against allowing an assignee for the benefit of creditors to exercise the power to take the cash value in *Planters State Bank v. Willingham's Assignee*:³⁶ but there the debtor's estate was the beneficiary and no "intimate" family relationships were at stake.

The same conflicts of social interests are reflected in the straight assignment cases. Insurance has increasingly occupied a larger status as an investment asset. It is natural to find that the insured has sought to use it in his credit dealings. In the early cases, where the insured did not have the reserved power to change the beneficiary or surrender the policy for its cash value the courts found no difficulty in denying relief to the assignee: the vested interest rule often served to protect the beneficiary unless she joined in the assignment.³⁷ Prior thereto, we have seen how the New York courts have voided the assignments even where the wife joined therein. In

³⁶111 Ky. 64, 23 Ky. L. R. 445, 63 S. W. 12 (1901); cf. *Larue's Assignee v. Larue*, 96 Ky. 326, 28 S. W. 790 (1894).

³⁷The cases illustrating this point are legion. See, e.g., *Whitehead et. al. v. New York Life Ins. Co.*, 102 N. Y. 143, 6 N. E. 267 (1886).

*Eadie v. Slimmon*³⁸ and the string of cases following it, the judges simply manufactured the doctrine that the "spirit" of the Verplanck statute forbade "trafficking" in wives' policies, even where the trafficking was done by the wife. Here there was no covert attempt to cloak what was being done under verbiage: the New York courts were forthright in their statements that the rule was judicially constructed to protect insurance against creditors.³⁹

With the development of the modern insurance contract these devices failed and new ones had to be found. The new policies made the insured the complete owner of the asset: where a beneficiary was designated he could change the designation at will, and regardless of the beneficiary's consent, could cancel the policy for its cash value. Under such policies the beneficiary's interest was of the vaguest kind: the best legal characterization applicable was that of "expectancy." Concomitantly with the development of the new contract came an increased use of the policy in credit transactions. Unless the courts desired to prevent the insured from dealing with the policy at all they had to give effect to his actions. Naturally this required decisions in favor of the creditor and against the beneficiary.⁴⁰ Perhaps the trend of decision in the creditors' favor is an indication of judicial fear that a different attitude would result in prejudice to the interest of the family in that it would militate against the writing of insurance in their favor. However that may be, the courts found their way clear to protecting an assignee of insurance, and rarely were troubled by the intimate nature of the insured's power to elect. In *Travelers Insurance Company v. Healey*,⁴¹ the New York courts held that an assignment of an insurance policy by the insured gave the assignee the power to surrender for cash which the insured had by virtue of the contract. In *Moser v. Connecticut Mutual Life Insurance Company*⁴² the Kentucky court reached an opposite conclusion, stating that it saw no difference between a specific

³⁸26 N. Y. 9 (1862).

³⁹See, e.g., the statement in *Frank v. Mutual Life Ins. Co. of New York*, 102 N. Y. 266, 6 N. E. 667 (1886).

⁴⁰The issue arose as follows: X, holding a policy on his life, and having complete dominion, designates Y as beneficiary. Then he assigns to A as collateral security. Y does not join. X dies. Does Y take the entire proceeds, or will A be permitted to realize on his assignment? Under the analysis here presented A should take, unquestionably. And the better-reasoned cases so declare. See, e.g., *Davis v. Modern Industrial Bank*, 279 N. Y. 405, 18 N. E. (2d) 639 (1939); *Potter v. Northwestern Mutual Life Ins. Co.*, 216 Ia. 799, 247 N. W. 669 (1933).

⁴¹25 App. Div. 53, 49 N. Y. Supp. 29 (3d Dep't 1898), *aff'd on op. below*, 164 N. Y. 607, 58 N. E. 1093 (1900). The case was twice tried; the first trial is reported in 28 N. Y. Supp. 478 (Sup. Ct. 1894); the appeal from that judgment is reported in 86 Hun. 524, 33 N. Y. Supp. 911 (3d Dep't 1895). The second trial is reported in 19 Misc. 584, 44 N. Y. Supp. 1043 (Sup. Ct. 1897).

⁴²134 Ky. 215, 119 S. W. 792 (1909).

assignment of an insurance policy and the general one involved in *Townsend v. Townsend*. Here, too, it felt the interest of the beneficiary outweighed the benefits to be derived from allowing policies to be freely used by insureds in their business dealings. But, five years later, in *Mutual Benefit Life Insurance Company v. First National Bank*⁴³ the court did some tight-rope walking and said that the policy in the *Moser* case dictated the result: there the cash value was payable to the "insured" and, therefore, the power was personal to him. In the *Mutual Benefit* case it was payable—impersonally—"on a surrender of the policy"; and this could be done by anyone, and, therefore, by the assignee of the insured.

The distinction is so fine that one must engage in contemplative tortures to sense it; perhaps it is a fair deduction that the Kentucky court was withdrawing from the advanced position assumed in the *Townsend* controversy. At any rate the current trend of judicial decision is definitely in the creditors' favor, and the assignment is deemed to transfer to the assignee the powers which the insured possessed.⁴⁴ Thus in *General American Life Insurance Company v. Frauenthal & Schwartz, Inc.*,⁴⁵ where X, the insured, assigned "all dividend, benefit and advantage to be had" from his policy, the assignee was held to have the status to exercise the power to elect the option that the contract be continued on as a term policy.

In all these cases the issue largely comes down to a construction of the scope of the assignment. Except in Kentucky, it is generally assumed that X can write such an instrument as will delegate to the assignee the power to make any election;⁴⁶ and basic in all the cases is the fact that X can donate or sell his policy and make his donee or vendee the owner.⁴⁷ In that event logic requires that the vendee have all of X's rights and powers.⁴⁸ This

⁴³160 Ky. 538, 169 S. W. 1028 (1914).

⁴⁴*Davis v. Modern Industrial Bank*, 279 N. Y. 405, 18 N. E. (2d) 639 (1939), reviews the various currents of opinion in this field.

⁴⁵193 Ark. 663, 101 S. W. (2d) 953 (1937).

⁴⁶See, e.g., *Bank of Idaho v. Illinois Life Insurance Co.*, 135 Kan. 129, 9 P. (2d) 629 (1932) (confirming power of pledgee to surrender for cash value); *National Life Insurance Co. of Vermont v. Beck & Gregg Hardware Co.*, 148 Ga. 757, 98 S. E. 266 (1919) (holding, pledgee has power to "renew" term life policy).

⁴⁷*Devin v. Connecticut Mutual Life Ins. Co.*, 59 Okla. 192, 158 Pac. 435, L. R. A. 1916F 783, 785 (1916).

⁴⁸Consider, e.g., the "gift" of a policy: X, having a policy on his life, and possessing all the usual powers, names Y as beneficiary. Thereafter he "gives" it to A, without changing the beneficiary. Does A take as against Y? The court said "Yes," in *Merillat v. Hooker*, 33 App. D. C. 192 (1909). Y merely had a "contingency"; X was the owner, and could destroy Y's interest. X did so when he made a gift to A before Y's inchoate interest vested. See, on gifts, *Woodward v. Metropolitan Life Ins. Co.*, 8 Cal. (2d) 361, 65 P. (2d) 353 (1937); *McEwen v. New York Life Ins. Co.*, 42 Cal. App. 133, 183 Pac. 373 (1919); *Chapman v. McIlwraith*, 77 Mo. 38 (1882); *Prudential Insur. Co. v. Deyerberg*, 101 N. J. Eq. 90, 137 Atl. 785 (1927); *Opitz v. Karel*, 118 Wis. 527, 95 N. W. 948, 62 L. R. A. 982 (1903). See also *Colburn's Appeal*, 74 Conn. 463, 51 Atl. 139 (1902); *Malone's Estate*, 8 W. N. 179 (Pa. 1880), *aff'd on op. below, sub. nom.* *Malone's Appeal*, 38 LEG. INTELL. 303 (Pa. 1881).

position is implicit in *Moon v. Williams*.⁴⁹ If that is so, then it follows that should *X* assign a policy as collateral security, then, even though his pledgee may not be able to exercise any powers prior to foreclosure (since those are "personal"), yet, after foreclosure, the purchaser may exercise every power by reason of ownership.⁵⁰ At least that is the conclusion of the Kentucky court in *Emery v. Manhattan Life Insurance Company*.⁵¹ But this seems to refute the prior position taken by the court in *Townsend's Assignee v. Townsend*⁵² as to the intimate nature of the powers. By working around the circle the court, apparently, has reached a conclusion which would have justified an exactly opposite result in the *Townsend* case. The "personal" nature of the power thus loses any independent content it may have had and becomes, simply, an excuse to prevent creditors from seizing cash values.⁵³

Doubtless, even the courts which have stuck to the "no election—no debt" theory, would concede that if the legislature "amended" the garnishment or attachment procedure so as to make the service of the writ equivalent

⁴⁹102 Fla. 214, 135 So. 555 (1931).

⁵⁰*Citizens Bank v. Pan American Life Ins. Co.*, 141 So. 481 (La. App. 1932); *Feliciana Bank & Trust Co. v. Union Central Life Ins. Co.*, 137 La. 674, 69 So. 91 (1915).

⁵¹179 Ky. 76, 200 S. W. 19, L. R. A. 1918C 568, 570 (1918).

⁵²*Supra* note 35.

⁵³For a comparable situation: *X* dies leaving a large estate, devised by will under which *Y*, the spouse, does not share, or else shares in an amount which is considerably smaller than the part which *Y* can claim by statute. Can a judgment creditor of *Y* compel *Y* to "elect" to take under the statute and renounce the will? The court held not in *Bottom v. Fultz*, 124 Ky. 302, 30 Ky. L. R. 479, 98 S. W. 1037 (1907), saying: "This is a personal privilege given to the husband, and it is one which he may exercise or not, at his pleasure; and we are of opinion that the court could not require of [Y] that he exercise that right. The law provides that he may, within one year, renounce the will and elect to take under the law. If he wishes to avail himself of his statutory right, he must follow the provisions of the statute, and his failure to do so within the time prescribed amounts to an election on his part to stand by the provisions of the will; but he has the entire year within which to act. . . ." *Accord*, *Bains, etc. v. Globe Bank and Trust Co.*, 136 Ky. 332, 124 S. W. 343 (1910); *Re Estate of Fleming*, 217 Pa. 610, 66 Atl. 874, 11 L. R. A. (n. s.) 379 (1907); see *Austin v. Collins*, 317 Mo. 435, 297 S. W. 36 (1927); cf. *Bradford v. Calhoun*, 120 Tenn. 53, 109 S. W. 502, 19 L. R. A. (n. s.) 595 (1908) (election held to operate by "relation back" to vitiate intervening creditor's process). However, if *X* dies intestate and leaves property which by law passes to *A* and *B*, *A* cannot "renounce" so as to deprive his creditors of relief. *Payton v. Monroe*, 110 Ga. 262, 34 S. E. 305 (1899). The cases are collected and discussed in: Note, *Right of one's creditors or personal representatives to make or control election for or against a will, or between different provisions of a will or statute* (1908) 11 L. R. A. (n. s.) 379; Note, *Right of creditors to complain of, or control, debtor's renunciation of benefit under will, or his election to take under or against the will* (1923) 27 A. L. R. 472; Note (1939) 37 MICH. L. REV. 1168. It is doubtful whether the most devout believer in judicial statics could accept this dogma without revolt. It is inescapable that insofar as judgment debtor *Y* has a power to bring property into his estate, that power is property which should be made available to his creditors. Where the same judicial stultification was revealed in *Jones v. Clifton*, 101 U. S. 225, 25 L. ed. 908 (1879) the legislature remedied the situation by statute [30 STAT. 565 (1898), 11 U. S. C. A. § 110 (1937)]. It cannot be denied that the same result was within the scope of judicial dialectic. With that as a premise there is no denying the gross inadequacy of the cases.

to an "election" or "demand" by *X*, then the writ would operate to attach cash surrender value. Such an attitude only accentuates the divorce of the legal plane from reality: and the judicial forum was never intended, cloister-like, to abstract itself from practical affairs; especially in the matter of creditors' remedies.

In *Rekstin v. Severo Sibirsko et al.*,⁵⁴ *X* directed his bank to transfer the balance in his account to *Y*. Shortly after the bookkeeping necessary to transfer the balance to *Y* on its book had been accomplished, a creditor of *X* served a garnishee order *nisi* on the bank. *Y* had not "consented" to the transfer. The court held, that the bank was still indebted to *X*. Acton, J., said that *X*'s direction could be countermanded by him, and the garnishee order was a "demand" sufficient to accomplish this purpose. Lord Hanworth, after stating that *X*'s order was revocable until *Y* consented, held that the effect of the garnishee order was to revoke *X*'s direction to have the fund transferred to *Y*. And Slessor, L.J., argued that the garnishment not only acted as a revocation, but also operated as a demand.

Now, there was nothing in the English statutes regulating garnishee practice, which, in terms, dictated the result. It was achieved by a court which was awake to the necessity of keeping the practice elastic to fit current business needs and practices. The same reasoning, applied to insurance cash surrender values, would require the holding that the service of the writ or warrant operated as the "election" or "demand" which *X* could exercise under the contract.

III. THE POWER OF ELECTION AS WITHIN THE GRASP OF ATTACHMENT

Against this background may be discussed *Columbia Bank v. Equitable Life Assurance Society*⁵⁵—probably the first case wherein the problem was raised. Certainly it was the conclusion of the New York court there which definitely set the "no election—no debt" hypothesis on its irresponsible path. There *X* was the holder of a tontine under the terms of which, on the completion of the tontine period ending on October 8, 1888, he would be entitled, *inter alia*, to have the option of (1) taking in cash the policy's entire share in the assets; or (2) convert it into a paid-up policy. Prior to the end of the term the policy had no cash value. Attachment was levied by the sheriff on October 8, 1888. The court held that the attachment seized nothing because on October 8th nothing was due to *X*; the term did not end until the day was over. Which meant, apparently, that the first day on which the attachment could have been levied was October 9th. The strict

⁵⁴[1933] 1 K. B. 47.

⁵⁵79 App. Div. 601, 80 N. Y. Supp. 428 (1st Dep't 1903).

correctness of this position is borne out by *Ellison v. Straw*.⁵⁶ Had the case been rested on that ground, it would have served to emphasize the necessity of broadening the attachment statutes to include debts "accruing due" as well as those "due," as was the experience in England with garnishee orders *nisi*⁵⁷ and subsequently in New York with third party orders⁵⁸ as well as attachments.⁵⁹ On that basis the decision is understandable, and reflects, once again, the judicial failure to interpret existing legal remedies so as to embrace newly developed business forms. The court, however, rested its decision on broader grounds. After October 8th X elected to take a paid-up policy in favor of his children. The question was argued whether the attachment would have operated differently had it been served subsequent to October 8th. To this the court replied in the negative. And it said:

"... It is necessary to keep clearly in mind what right [X] acquired under his contract with the defendant. Undoubtedly, . . . [X] had the right to elect to surrender his policy and to withdraw its cash value. He also had the right to elect to accept a paid-up policy . . . but this right was exclusively vested in the legal holder of the policy. . . . The attaching creditor is not the legal holder of the policy. It . . . only acquired a lien upon whatever demand there was due from the defendant to [X]; but until the legal holder . . . had exercised his option, there was nothing due, and no demand in favor of [X] against the insurance company existed. . . . Assuming that [X] . . . had the right to exercise that option notwithstanding the service of the warrant of attachment, then this action cannot be maintained, which is to recover the amount that would have been due to [X] had he exercised the option to withdraw the cash value of the policy upon the completion of the tontine dividend period. No such election was ever made by [X]. . . . Neither the plaintiff nor the sheriff was ever in a position in which . . . they could make the election, and until that election was actually made, there was nothing due from the insurance company to [X].

"By section 648 of the Code of Civil Procedure the attachment may be levied upon a cause of action arising upon contract, which belongs to the defendant and is found within the county, and in such a case the levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of, the debt represented thereby. By subdivision 3 of section 649 of the Code the levy is to be made by leaving a certified copy of the warrant and a notice showing the property attached with the person against whom the demand exists. Now, what is the demand that existed in favor of [X] upon the completion of this tontine dividend period? It was the right to receive from the company either a sum of money or a policy of life insurance, as he should elect. When

⁵⁶*Supra* note 18.

⁵⁷Annual Practice, Order 45, Rules 1-9.

⁵⁸N. Y. CIV. PROC. ACT (Cahill, 1939) § 799; see Cohen, *supra* note 21, at 1221 *et seq.*

⁵⁹N. Y. CODE CIV. PROC. (Throop, 1877) § 648.

the election had been made, then a cause of action arose against the insurance company in favor of [X], which would, under *Kratzenstein v. Lehman and Trepagnier & Brothers v. Rose* (*supra*) be subject to the attachment but, as I read these sections of the Code, the right to elect is neither a cause of action existing in favor of [X] nor a demand against the insurance company, which can be levied upon under a warrant of attachment. 'Cause of Action' is defined in Bouvier's Law Dictionary as 'Matter for which an action may be brought. . . . A cause of action does not accrue until the existence of such a state of things as will enable a person having the proper relations to the property or persons concerned to bring an action.' In the Encyclopaedia of Pleading and Practice (Vol. 1, p. 116) it is said: 'A cause of action is generally held to be a union of the right of the plaintiff and its infringement by the defendant.' There could, therefore, be no cause of action until the insurance company was in default and had failed to comply with its contract, and there was certainly no failure of the defendant to comply with the contract until the legal holder of the policy had made the election provided for. The right to attach a cause of action would not give the right to attach this right to elect under section 648 of the Code. This right is to attach the property of the party against whom the attachment is issued, and this is recognized by the 3d subdivision of section 649 of the Code, which provides that the levy may be made upon other personal property if it consists of a demand other than as specified in the 2d subdivision of the section, by leaving a certified copy of the warrant and a notice showing the property attached with the person against whom it exists. It must, therefore, have been property which consists of a demand against this insurance company, and, certainly, a right to determine what particular form the obligation of the insurance company should be cannot be said to be property under this subdivision. When the right to receive the money is in existence, the demand then exists, and that demand would be subject to attachment; but the right to determine is not such a demand. The election preceded the existence of such a cause of action against the defendant, as it could not have discharged its obligation until the legal holder of the policy had exercised the right to elect. A tender of the cash value of the policy on the completion of the tontine dividend period would not have discharged the defendant unless the legal holder of the policy had elected to accept that option."

We have here two stated reasons why the creditor was deemed to have no standing to touch the cash value: (1) At the time the attachment was levied nothing was due the debtor because he had not exercised his election; and (2) The attachment statute did not apply so as to attach "powers." We have already examined the first reason. The second invites some discussion. The provisional remedies of attachment and garnishment were conceived to apply to debts and "causes of action." Strictly speaking, a power is neither a debt nor a cause of action. And yet a power to make a debt

become payable would seem to be a lesser estate than the debt itself. If the latter could be attached why not the power? A simple, logical argument could be constructed to reach such a conclusion. However, it must be admitted that the usual judicial reaction was opposed to such rationalization. In bankruptcy, for instance, the debtor's "powers" did not pass to the trustee until a special statute⁶⁰ was drafted for that purpose. There the conceptual conflict was posed as between "property"—which did pass—and "powers." Were powers property? *Jones v. Clifton*⁶¹ held not. So one might conclude that the lesson to be learned is that the legislature should be asked to broaden the attachment statutes so as to permit the attachment of "powers."⁶² It is, however, rather disheartening that the courts have abdicated their proper function of retranslating legal forms to keep up with the times.⁶³

These words of the *Columbia Bank* case were echoed in the subsequent "no election—no debt" cases. By way of further comment it is important to remember (1) that the policy involved was a tontine—a special contract no longer issued. No tontines were involved in the cases that followed—(2) the reasoning on the point was straight dictum. It was not necessary to decide the narrow question here presented. However, assuming the content of the opinion on the matter discussed was valid, it was not entirely accurate. At the end of the term the contract had a definite cash value. This was owing to X. He could elect to take it in cash, or he could direct that a paid-up policy be issued. Had the latter been done, and the policy been taken payable to X or his estate, it would have had value which could have been ascertained in proper judicial proceedings. If X had nominated his children as the irrevocable beneficiaries of the paid up policy, then the transactions would have involved the transfer of value from X to them: If X were insolvent at the time this would have constituted a fraudulent transfer which his creditors could upset. Apart from this, X's "options"—insofar as they included the power to designate himself, his children or other persons as the beneficiaries of cash value in the form of a paid-up policy—was merely a power to appoint. And this, by statute, had been

⁶⁰30 STAT. 565 (1898), 11 U. S. C. A. § 110 (1937).

⁶¹101 U. S. 225, 25 L. ed. 908 (1879).

⁶²*But cf.* *Stagg v. British Controlled Oilfields, Ltd.*, *supra* note 25, wherein an option was held attachable.

⁶³Classically, of course, "powers" are not "property." See the discussion in 1 *SIMES, FUTURE INTERESTS* (1936) §§ 265, 266. And there is still a great amount of tongue-wagging over equity's determination that the creditors of a donee of a power of appointment may reach the appointed property if the power is exercised. In the light of present day business practices, this conception reflects an ancient prejudice. An occasional heterodox case like *Hoskin v. West*, 226 Iowa 612, 284 N. W. 809 (1939), noted (1939) 53 HARV. L. REV. 147, may indicate a judicial attempt to take up the lag.

within the reach of creditors.⁶⁴ A proper regard for the meaning of the statute should have resulted in a direction that the power after levy of attachment could be exercised only for the benefit of X's creditors. Either a peculiar short-sightedness on the part of the court or its desire to add further obstacles to creditors' efforts to reach insurance values, resulted in the conclusion it reached.

Thus far we have limited our discussion to an estate policy. But powers to get cash values exist in all kinds of policies—including those having designated beneficiaries. No attempt is made to argue here that the attachment statute should be deemed to override all the acts in the books. Clearly, whether a "power" is attachable presents a bifurcated problem: *first*, whether the power involved can be reached by any process; and, *secondly*, if it can, will attachment be such a process. Now the courts have so construed the insurance exemptions so as to free absolutely a power running to a debtor in a policy designating a named beneficiary. As a substantial matter, such powers cannot be reached by any process. The powers we are considering are limited to those instances where the policy is non-exempt. The two groups may be isolated on the legal terrain—insofar as the attachment angle is involved—by saying that the attachment act will be construed "*in pari materia*" with the exemption laws: *non constat* our continuing objection, in substance, to the unlimited scope of the exemption freeing such powers from creditors' process.

IV. POLICY CONDITIONS

The sort of judicial thinking which has given us the "no election—no debt" solution is also responsible for some fancy interpretations of "conditions." For example, in *Larson v. McCormack*,⁶⁵ X carried some \$50,000 worth of insurance payable to a bank. X applied for a loan to the insurance company, enclosing the bank's release of its interest. The loan was granted and a check for \$4,000 was mailed to the Illinois agent of the company. The agent was instructed not to deliver the check until X nominated a beneficiary for his policy. Meanwhile a creditor of X garnished the company. The policy provided that the company could defer granting a loan for 90 days after the application was received. On these facts the garnishment was discharged.

Two matters were relied on to achieve the decision. *First*, the 90 day period had not expired when the garnishee summons was served. This would be a creditable answer were it not for the fact that the company had already granted the loan and thus waived the provision. *Second*, the com-

⁶⁴N. Y. REAL PROP. LAW, Art. 5, §§ 159, 162; but see discussion *infra* note 72. See also 1 SCOTT, TRUSTS (2d ed. 1939) § 158.1.

⁶⁵*Supra* note 15.

pany, for its own "protection" could insist on the nomination of a beneficiary. The exact chain of thinking here just manages to elude analysis. Was this a policy provision? The court does not so state. What was the company to be "protected" against? No extraordinary danger is disclosed; in fact none is shown. Just where lay the basis for the decision: whether in contract or the mercy of equity, is not marked off with exactness in the opinion. Beyond question, the case is indefensible. It cannot be distinguished from *Cooper v. West*,⁶⁶ where the insurance company drew a check in payment of cash value due X and forwarded the check to its agent with instructions not to deliver until the policy beneficiaries signed releases. Nevertheless the fund was held to be attachable.

Larson v. McCormack is not an exact instance of the problem raised by "policy conditions" as a barrier to the enforcement of creditors' remedies. In *Ogle v. Barron*⁶⁷ and *Craven v. Roberts*⁶⁸ the fund was payable only on the return of the certificate properly endorsed. This condition was deemed sufficient to deny to creditors the power to garnishee the fund since they were in no "position" to comply with the condition. In *Kothe v. Phoenix Mutual Life Insurance Company*⁶⁹ the contract provided that the cash value would be paid when X surrendered the policy and executed a satisfactory release. X, an embezzler, had absconded with the policy. Nevertheless the creditor was denied relief because he could not produce the policy.

These cases illustrate a judicial attitude which would make it almost impossible to apply any creditor's remedy to insurance. In the instances quoted the obvious purpose of the "conditions" was protection to the insurance company. The conditions did not go to the essence of the contract: they did not create the debts, nor were they part of the consideration. Insofar as their purpose was defensive only, as against the insured debtor, it is particularly exasperating that they should be used to cripple creditors. It is almost incomprehensible that the courts should not have realized that the exact results intended by the "conditions" could have been achieved by a clause in the decree.

V. INDUSTRIAL INSURANCE

It may safely be predicated that industrial insurance, a legal will-o'-the-wisp, will have an interesting career in its future journeys through the demesnes of the law. In the older policies it was the practice to nominate a beneficiary; the usual practice today is to the contrary. But in both

⁶⁶173 Ky. 289, 190 S. W. 1085 (1917).

⁶⁷247 Pa. 19, 92 Atl. 1071 (1915).

⁶⁸60 Pa. Super. 140 (1914).

⁶⁹269 Mass. 148, 168 N. E. 737 (1929).

policies there is a clause of marvelous ingenuity, famous, under its name, as the "facility of payment" clause. Under the ordinary policy written today the company promises to pay to the personal representatives of the insured *unless* it elects to pay under the facility of payment clause. Under this clause the company may pay the fund to anyone of a specified group of people there designated by class: certain blood relatives of the insured or persons "equitably" entitled to the insurance.

The most bewildered person in this interesting little tangle is the creditor of the insured, or of one of the persons who may be designated as the beneficiary of the fund. What rights has he? The answer, under the present frame of reference, is a matter of grand guess work. Disregarding past judicial conduct we will attempt the fairly hazardous job of constructing a theory out of ancient concepts.

It should seem obvious that the owner of the insurance is the insured. His power to assign and transfer ownership in the contract should be judicially protected. Following therefrom, it is obvious that the insured's beneficiary is primarily his estate—absent other valid disposition by him. The contract, on his death, causes an obligation to arise to pay some one—call it a debt from the company, if you will. Clearly the debt is due to the estate, in the first instance. If there are creditors of the estate they should be permitted to have a prior claim and first lien on the funds.

Such an attitude would have the virtue of consistency, the benefits accruing with some measure of certainty, and would afford some measure of protection to one class of creditors. And it would be justified by many ancient and respected conceptions of the law. The contract rights are an asset of the insured, payable to his estate. Here the courts interpolate, and add "subject to the election of the company to pay some one else." That election, however, should not be permitted to prejudice estate creditors. If X, the insured, as the donee of a power of designation could transfer an estate to other persons, and he exercised that power, equity requires that the property subject to the power must first go to satisfy creditors of the donee's estate before it can be used by the beneficiary named under the power.⁷⁰ Anomalous though it be, creditors of the donee of a power of appointment have no claim if the power remains unexercised.⁷¹ New York has apparently implemented the doctrine by giving equal rights to creditors even in such a case.⁷²

Considering the power to designate a beneficiary under the facility of payment clause as a power of appointment, it follows that the exercise of

⁷⁰See 1 SCOTT, *loc. cit. supra* note 64.

⁷¹*Ibid.*

⁷²N. Y. REAL PROP. LAW, Art. 5, §§ 159, 162, 149. However, the New York courts have interpreted the statutes so as to deprive creditors of their apparent statutory remedy. See *Cutting v. Cutting*, 86 N. Y. 522 (1881).

that power by *X* should operate to benefit his creditors under the ancient equitable rule. And, it is not improper to consider the designation by the company as the designation by an agent of *X* to exercise the power. To that extent at least, the power is delegable—an interesting sidelight on the “personal nature” of the power so devoutly worshipped in *Townsend v. Townsend*. Such a theory would always operate to the advantage of *X*'s estate, since it is the primary beneficiary. Exercise of the power by the company as *X*'s agent, in favor of some other person would redound to the benefit of the estate's creditors under the equitable rule. And under the same rule, apart from statutory implementation, non-exercise of the power would equally benefit the estate, for it is the primary named beneficiary to whom the fund is to be paid absent action under the power of appointment.

There remains to be considered creditors of the beneficiaries who may be designated as such by the company, under the power of appointment as *X*'s agent. In what status do they find themselves? Here, again, we start with the assumption that a debt there is, on *X*'s death, due someone; if not to *X*'s estate, at least to anyone of a specified class. If *B*, a member of this class is indebted to *C*, what effect should be given to an attachment, garnishment, trustee process, or other provisional remedy served on the company by *C* prior to designation of *B* as the beneficiary of the fund?

Orthodox conceptualism, misled by the nature of the facility of payment clause, might say that until the company had designated a beneficiary under the facility of payment clause, there was no “debt” and thus no attachment could lie. That was the indicated reasoning in *Castaldo v. Woodside*,⁷³ and yet it is certainly not correct. *First*, as a practical matter, such action would result in completely sterilizing creditors' remedies against the fund, and without any valid policy in support thereof. For, obviously, if no “debt” existed until designation, and payment followed right on the heels of the appointment, creditors could never have an opportunity to insulate the fund in the company's hands by provisional remedy. Nor, in the absence of publicity—which is always absent in such cases—could they ever know who was the designated beneficiary so as to serve the process even in the event of delay between appointment and payment.

Secondly, conceptualism itself is opposed to such a result. The conclusion in the *Castaldo* case is premised on the assumption that no debt to the future designee exists until designation. As stated there is a measure of truth and untruth in the assumption. The untruth is founded in the non-recognition of the fact that a “debt” to some one did exist all the time. The measure of truth is indicated in the fact that there was no obligation to pay the

⁷³295 Mass. 586, 4 N. E. (2d) 462 (1936).

person ultimately designated as beneficiary: if other persons in the permissible class existed payment could be made to any one of them. Until designation no one of the class could sue to recover the fund. Suit for recovery is exclusively vested in *X*'s estate until the company acts under the power of appointment.⁷⁴ But payment will ultimately be made to a member of the class if the company acts in that member's favor. We are faced, then, with the fact that the ancient conception of debt to *some one* as the predicated basis for the issuance of provisional remedies by that person's creditors is not alone capable of supporting attachment. However, the court ought to seek a method for supporting the attachment, otherwise the creditor is without remedy. This is easily shown: Attachment is served on the company to reach a debt due to *B*—a member of the permissive class—before *B* is named as beneficiary. *Castaldo v. Woodside* would hold that the attachment is bad—no debt due to *B*. But if the company subsequently did designate *B* and paid him, we find a course of practice outlined which will prevent any effective creditor relief. In that exigency the courts may have recourse to another conception to achieve a proper result: and this is the doctrine of "relation-back." This is an ancient dogma followed in bankruptcy and receivership matters to vest title in the trustee or receiver as of a date prior to the actual appointment of the officer.⁷⁵ Since there is a debt due from the company it would be a perfectly proper method of reasoning to say that the debt was due to *B*, the subsequently named beneficiary, by "relation back" as of the date of the service of the provisional remedy, so as to sustain its validity. There was the result reached in *Kassow v. Feldman*,⁷⁶ though the reasoning of the opinion does not go as far as indicated in the present discussion. An exactly contrary decision was made in *Metropolitan Life Insurance Company v. Hightower*⁷⁷ on a straight application of the "no debt to the beneficiary finally paid" conception. The result is the product of lethargy, dictated by a complete lack of judicial imagination. Uniformed by any rational plan, it is merely additional evidence of the heterogeneous atomic action which is fast making industrial insurance a nondescript creature of the law.

VI. POLICY VALUE AS BASIS FOR PROCESS

When the creditor attached the debtor's interest in a policy he carried

⁷⁴*Craig v. Metropolitan Life Ins. Co.*, 250 App. Div. 561, 294 N. Y. Supp. 787 (1st Dep't 1937); see *McCarthy v. Prudential Ins. Co.*, 252 N. Y. 459, 169 N. E. 645 (1930).

⁷⁵See Cohen, *Collection of Money Judgments in New York: Supplementary Proceedings* (1935) 35 Col. L. Rev. 1007, 1017, 1026.

⁷⁶125 Pa. Super. 286, 189 Atl. 719 (1937).

⁷⁷211 Ky. 36, 276 S. W. 1063 (1925).

with the garnishee in *Day v. New England Life Insurance Company*⁷⁸ cash value had not yet achieved the importance it holds today. The creditor failed to introduce any evidence of the cash value of the policy or X's power to surrender for such value. Perhaps that was the reason why the creditor failed. Support for this is found in the court's statement that X's death was indispensable to any action on the policy. That seems to be the only basis on which the case can be explained. Certainly the fact that insurance policies had value had been judicially acknowledged for some time. In *Anthracite Insurance Company v. Sears*,⁷⁹ a policy on the debtor's life was held to be within the reach of trustee process and value was determined from the practice of the insurance companies to buy in their policies whenever able. The opinion in *Day v. New England Life Insurance Company* placed a great deal of emphasis on contingency as rendering the insurance company immune from process. But in *Biggert v. Straub*,⁸⁰ the debtor's interest was contingent on outliving his wife. This did not prevent the creditor from proceeding with his attachment. In such a case, said the court, value can be ascertained by appraisal, sale, or other means within the ordinary procedure of the court.

VII. MUST THE SHERIFF SEIZE THE POLICY?

Until recently the New York Practice Act provided that levy under a warrant of attachment upon personal property capable of manual delivery, including a bond, promissory note, or other instrument for the payment of money must be made by "taking the same into the sheriff's actual custody." Levy could be made on "other personal property, by leaving a certified copy of the warrant, and a notice showing the property attached with the person holding the same," or, if it consisted of a demand (other than those just listed above) then by leaving the notice "with the person against whom it exists."⁸¹

That the relationship between insurer and insured is a status wherein various rights, powers, privileges and immunities interplay is a conception of which there can be no doubt. The policy itself is but the evidence of the terms of this relationship. Certainly it is not a negotiable instrument within the meaning of the statute requiring such instruments to be seized by the sheriff as a prerequisite to a valid attachment. That, ultimately, was the holding in *Kratzenstein v. Lehman*.⁸² But the contention that the policy

⁷⁸111 Pa. 507, 4 Atl. 748 (1886).

⁷⁹109 Mass. 383 (1872).

⁸⁰193 Mass. 77, 78 N. E. 770 (1906).

⁸¹N. Y. Civ. Prac. Act (Cahill, 1939) § 917.

⁸²42 N. Y. Supp. 237 (City Ct. N. Y. 1896).

was an "instrument for the payment of money" was solemnly made and as solemnly accepted by the dissenting members of the court.

In New York, the problem no longer exists: the recent revisions codify the holding of the *Kratzenstein* decision.⁸³

FUTURE DIRECTIONS:

AND HEREIN OF THE NEW YORK REVISION

The foregoing discussion, as indicated at the beginning, is capable of bearing a varied emphasis. On the legal—the "purely" legal—plane it is an exercise in judicial dialectics. And there an obvious lection points to judicial astigmatism in the construction of the attachment statutes. For this purpose the insurance policy is merely one of the materials used in the problem of analysis. But from the institutional angle the material may be viewed differently: and here the emphasis is broader, the light more diffused. Clearly the conclusion of the judges is another example of the special treatment which has been granted to life insurance. But this is the only thing which can be grasped with certainty: the rest, embracing a vague and huge horizon, is lost to us. We can stand in one part of this plane, and, looking backwards, assert that debts should be paid. We can write down the effort of the judges as tending to hinder the accomplishment of that desire. We can give those efforts an intention which may never in fact have existed. Adding these together we may produce a backdrop for a stage across which private property charges in furious abandon.

But there we stop: The meaning of the play still remains obscure. Our function is to collect debts. And that requires us to walk a special treadmill to a special tune: It is only from the experience of that treadmill and the inspiration of that tune that this is written. And, limiting our vision to the legal plane, we can review a familiar pattern. As always, where judicial labours have resulted unsatisfactorily, recourse is had to the legislature to restate the premise. In New York there has recently occurred a revision of the attachment statutes.⁸⁴ However, the new act still conditions the privilege of using the process on the existence of a "debt."⁸⁵ Nor was the legislature—at least, the statute furnishes no evidence thereof—informed of the problem from the angle of attaching "powers." The statute does not in *haec verba* attempt to make powers attachable. But there is a tantalizing section⁸⁶ which holds that the attachment may also be levied on:

⁸³N. Y. CIV. PRAC. ACT § 917, as amended by Laws 1940, c. 625.

⁸⁴For a discussion of this revision see Finn, *The Streamlining of Attachment Procedure* (1940) 9 FORD. L. REV. 1.

⁸⁵N. Y. CIV. PRAC. ACT § 916, as amended.

⁸⁶*Id.*, subd. 3. The present section contains six divisions; three of these are posed in

"A debt, arising under or on account of a contract, not represented by a bond, promissory note or other instrument for the payment thereof, negotiable or otherwise, whether or not the said debt is past due, or yet to become due, . . . provided that an action could be maintained by the defendant within the state for the recovery of such debt at the maturity thereof or where the debt consists of a deposit of money not to be repaid at a fixed time but only upon a special demand, that such demand therefor could be duly made by the defendant within the state. The levy of the attachment thereon is deemed a levy upon, and a seizure of all the rights of the defendant in or to the said debt."

The obvious difficulty with this section is that it still remains anchored to "debt." Yet it does extend the scope of the process to a money deposit not due except on special demand—and allows the attachment to create the necessary "demand." The analogy to the insurance policy is clear; but it is still a mere analogy. It would require a definite effort to put an equal sign between "cash surrender value" and "deposit of money," *non constat* that in reality such is the case. Even if that is accomplished the basic defect of the statute—*i.e.*, its failure to include powers, and its predilection with "debt"—would still remain to plague us in some future property variations. Nevertheless, this language may provide a base on which can be predicated a reversal of the decision in the *Columbia Bank* litigation. More—this language might even justify the seizure of the cash value of a policy wherein a named beneficiary was designated. But this would clash with the exemption laws. And such a result would hardly be permitted to obtain. Undoubtedly the new statute will be found to be in *pari materia* with Section 166 of the Insurance Law and its special domain carefully circumscribed. But if that domain includes a reversal of *Columbia Bank v. Equitable Life* it will be a marked improvement on the present procedure.

terms of "debt," one bears on a "cause of action," another deals with estate interests, and the last has to do with a "right" or "interest" in a property or fund controlled by a fiduciary which can be transferred by the debtor. The "cause of action" clause is not applicable to our problem; none exists until the insured has exercised his election. The "fiduciary" section may or may not be in point; it is general enough to serve the purpose, if the courts will feed it the necessary content. Its very generality, however, is against it if it should be tossed into the lap of a hostile bench. That the statute was not drafted with any eye to the point involved here seems obvious. And in recommending the enactment of the statute, the Legislation Committee of the Association of the Bar commented only that the bill would effect: "Abolition of the doctrine that an attachment is leviable only on legal interests and does not extend to equitable interests in personalty. Extension of the right to attach to various classes of assignable property. . . ." COMMITTEE ON STATE LEGISLATION REPORTS (1940) BULL. No. 4, REP. No. 72.