holding that the mutilation of a check constitutes a conversion thereof are situations in which the drawee bank paid the proceeds to a forger, it is equally true here that the bank might be said to have handled the check in a manner so inconsistent with the rights of the owner, the payee, that it converted it.

Many cases hold that only some of the acts of the bank in this case complete payment. The bank, if it had obeyed the drawer's order, might have been rendered liable to the payee for conversion. For these reasons, the Supreme Court of Minnesota should have held that the check had been paid.

JACK L. PIERSON

INSURANCE—CHANGE OF BENEFICIARY BY WILL

In the fall of 1944, the insured, an RAF airman stationed in Canada, executed his last will and testament. One of the stipulations in the will was that all of his property, including insurance, should go to his grandmother if he should die unmarried. The insured had been divorced by his wife several months prior to the execution of the will. He held two life insurance policies, and in each of these his former wife was the named beneficiary. The policies reserved to the insured the right to change beneficiaries, provided that he complied with certain formalities.[1] It was conceded that the deceased made no attempt to effect a change of beneficiary other than by his will. In December, 1944, the insured was lost at sea in the line of duty, and shortly thereafter was declared dead. The named beneficiary brought an action for declaratory judgments against the grandmother and the two insurance companies. The insurance companies, as interpleaders, conceded liability and paid the respective amounts of the policies into court. The trial court gave judgment for the grandmother, but this was reversed on appeal[2] and judgment entered for the ex-wife. The Supreme Court of Ohio affirmed the latter judgment by a four-to-three decision.[3]

The majority of the court concluded that the named beneficiary was entitled to the proceeds. They reached this conclusion by

1. The opinion does not disclose the formalities required. Generally, such policies provide for a change of beneficiary upon written request to the insurer. The change is then to take effect when indorsements are made on the policy by the insurer and the insured.
2. Glenn v. Stephens, 44 Ohio O. 476, 92 N.E.2d 29 (1950).
3. Stone v. Stephens, 155 Ohio St. 595, 99 N.E.2d 766 (1951).

the following reasoning: the insured's will was of no effect while he lived; also, during his life there was a total failure to comply with the formalities required for a change of beneficiary; therefore, nothing occurred during the deceased's life which could operate to divest the named beneficiary of her interest in the proceeds of the policies. In denying the attempted testamentary change, the majority felt that certainty as to the beneficiary would be achieved and that promptness of payment of life insurance proceeds would thereby be encouraged. These objectives were deemed more desirable from a public policy viewpoint than a carrying out of the precise wishes of the insured.

The dissenting opinions reasoned that the change by will should be given effect as the latest expression of the insured's intent.[4]

When the life insurance policy reserves to the insured the right to change the beneficiary, what is the interest of the named beneficiary? Some courts have said that the named beneficiary has a vested interest, subject to defeasance. This interest then ripens into an absolute right to the proceeds upon the death of the insured.[5] A far larger number of courts, Ohio included, describe the interest of the named beneficiary as "contingent," "inchoate," or "expectant." This right then vests[6] upon the death of the insured.[7] Similarly, a legatee's interest under a will vests upon the death of the testator.[8] In this Ohio case, then, the interests of the two contestants crystallized at the same split-instant of time. When two such simultaneously-vesting claims are in conflict, which ought to prevail? Further, will a

4. Courts have often expressed their willingness to effectuate an insured's intent with respect to the recipient of the proceeds. Glen v. Aetna Life Ins. Co., 73 Ohio App. 452, 56 N.E.2d 951 (1943). *Cf.*, Texas Co. v. Xavier, 54 F. Supp. 722, 727 (1944) involving the designation of a beneficiary of stock shares purchased under an employee's stock subscription plan. *Contra:* 2 COUCH, CYCLOPEDIA OF INSURANCE LAW § 315, ". . . nor is a mere intention to change the beneficiary sufficient. . . ."

5. Strachan v. Prudential Ins. Co. of America, 321 Mass. 507, 73 N.E.2d 840 (1947); Tyler v. Treasurer & Receiver General, 226 Mass. 306, 115 N.E. 300 (1917); Barbin v. Moore, 85 N.H. 362, 159 Atl. 409 (1932). *Cf.* Parks' Ex'rs v. Parks, 288 Ky. 435, 156 S.W.2d 480 (1941), which terms the beneficiary's interest ". . . a right subject to be defeated by the exercise of the reserved power or the lapsing of the policy."

6. 2 COUCH, *op. cit. supra* note 4, at 825.

7. When courts speak of a present, vested interest, is the beneficiary in a stronger position than when the interest is termed contingent or expectant? It is apparently more difficult to designate a new beneficiary when the interest is described as presently vested. 19 A.L.R.2d 28 (1951).

8. 2 PAGE, LAW OF WILLS §§ 938, 1586 (3d ed. 1941).

decision for one or the other of the claimants visit any hardship on the insurance company? Ought the court disregard the terms of the contract and give effect to the deceased's intent as expressed in his duly executed will? These are some of the important questions raised by the principal case.

There is a paucity of cases involving similar factual situations. Although the decisions are too few in number to permit the statement of a well-defined majority rule, most of the cases thus far have not allowed a change of beneficiary by will.[9] In denying the attempted testamentary change, the courts have relied heavily on the policy factor of prompt and expeditious payment of insurance proceeds. However, a relatively recent Arkansas decision[10] has upheld the claim of the legatee upon facts nearly identical with those of the principal case. The *ratio decidendi* of the Supreme Court of Arkansas was that the intent of the insured should prevail. Its opinion is extensively quoted in the dissent in the principal case.

There have been other cases in which a testamentary change of beneficiary has been allowed.[11] However, these have most frequently involved either policies payable to the estate of the insured or policies reserving the right to change the beneficiary without regulating the mode of change.[12] Such cases are too dissimilar from the *Stone* case to merit any treatment within the confines of this comment.

When policies have prescribed certain formalities as to the manner of change, courts have been not at all consistent in determining when an insured has effectively designated a new beneficiary. Some jurisdictions require that there be strict compliance with the prescribed manner of designating a new beneficiary. However, the majority of states, Ohio included,[13] hold

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9. Metropolitan Life Ins. Co. v. Jones, 307 Ill. App. 652, 30 N.E.2d 927 (1941); Bennett v. Bennett, 70 Ohio App. 187, 45 N.E.2d 614 (1942); Wannamaker v. Stroman, 167 S.C. 484, 166 S.E. 621 (1932).

10. Pedron v. Olds, 193 Ark. 1026, 105 S.W.2d 70 (1937). But see Grismore, *Changing the Beneficiary of a Life Insurance Contract*, 48 MICH. L. REV. 591, 601 (1950), wherein it is stated that the decision of the *Pedron* case is contra to the decisions of most courts to which this factual situation has been presented.

11. See 43 A.L.R. 573 (1926) for extensive collection of cases on this point.

12. See 2 COUCH, *op. cit. supra* note 4, § 318 and cases collected therein.

13. Atkinson v. Metropolitan Life Ins. Co., 114 Ohio St. 109, 150 N.E. 748 (1926); Arnold v. Newcomb, 104 Ohio St. 578, 136 N.E. 206 (1922).

that by substantial compliance the insured can effect a change of beneficiary.[14] No change, then, has been allowed without either complete or substantial adherence to the necessary procedures, unless some unique set of circumstances has rendered compliance impossible.[15] The Arkansas decision is, of course, a notable exception.

There exists a hopeless amount of confusion regarding whom the provisions regulating change are designed to protect. Perhaps the most reasonable explanation is that advanced by Professor Grismore in a recent article contained in the *Michigan Law Review*.[16] It is therein stated that the formalities for change are not primarily designed as protection for either the beneficiary or the insurer. Rather, he says, they are intended to provide assurance of the authenticity of the insured's desire to designate a new beneficiary. Professor Grismore thinks that the only problem is the determination of whether there has been compliance sufficient to furnish authentic evidence of the insured's desire to effect a change. It is only one step beyond Professor Grismore's view to reason that there is no need to insist on any degree of compliance with formalities. When the insured has, in some other manner, furnished clear and trustworthy evidence of his wish to name a new beneficiary, that should be sufficient. If a will can provide such authentic evidence of the insured's wishes, then the reason for satisfying the formalities has atrophied.

It is often said that when the insurance company, after the death of the insured, does not insist upon compliance with the formalities, there is a "waiver" of that which was intended to protect the insurer.[17] The use of the word waiver is perhaps

14. 2 COUCH, *op. cit. supra* note 4, § 315a and authorities therein cited.

15. When compliance with formalities has been rendered impossible by circumstances beyond the insured's control and when the insured has clearly expressed his desire to designate a new beneficiary, the desired change may be effected. See Finnerty v. Cook, 118 Colo. 310, 195 P.2d 973 (1948). It is submitted that perhaps the grandmother in the instant case might have successfully pleaded impossibility as an excuse for the insured's failure to comply with the stipulated methods of change. The insured was in the RAF, and it was time of war. As a matter of conjecture, it might have been impossible for the insured to follow the normal, prescribed methods for change.

16. *Changing the Beneficiary of a Life Insurance Policy*, 48 MICH. L. REV. 591, 597 (1950).

17. Sun Life Assur. Co. v. Secoy, 72 F. Supp. 83 (N.D. Ohio 1947); Atkinson v. Metropolitan Life Ins. Co., 114 Ohio St. 109, 150 N.E. 748

unfortunate. The company is not really waiving anything at all. The insurer is in the position of a disinterested stakeholder. It merely recognizes that there are conflicting claims to the proceeds and asks that the court decide which of the real parties in interest is possessed of the superior right. The insurer's act of interpleader should have no effect on the subtantive rights of the claimants. In making its award, the court should consider only the acts of the insured.

Suppose the court would allow the testamentary change of beneficiary. Are there any foreseeable, undesirable effects? Might the insurance company be subjected to double liability? It seems clear that if the company pays the named beneficiary without notice of the will, it would not be held liable to the legatee.[18] In paying to the named beneficiary, it will have completely complied with the terms of its contract.[19] No more could be expected of it. If, on the other hand, the company has notice of a will, it can protect itself by paying the proceeds into court. By interpleader, the insurer concedes liability to whoever might be the rightful claimant and leaves to the court the responsibility of determining who that person might be.

It is conceivable that the allowance of a testamentary change would stimulate additional litigation. Once it were established that, formalities notwithstanding, claims to insurance proceeds by persons other than formally designated beneficiaries might be validated, payment to the named beneficiary might be contested in many more instances than at present. However, the possibility of increased litigation should not, of itself, be of much weight in deciding for or against an attempted testamentary change. It is the court's responsibility to resolve the threat of a potential deluge without denying recourse to those individuals possessed of claims which need adjudication.

If testamentary changes of beneficiary were allowed, one might reasonably suppose that additional uncertainty would be

(1926). 2 APPLEMAN, INSURANCE L & P 464, 469 (1941); Grismore, *supra* note 10, at 595.

18. Certainly no cases have been found in which the company was held liable after it had either paid the proceeds to the named beneficiary or had interpleaded.

19. If a legatee be found entitled to the proceeds after the company has in good faith paid the named beneficiary, then the legatee should logically be able to recover the payment from the named beneficiary. Again, the action of the insurer should have no effect on the rights of the parties claiming the proceeds.

created.[20] Whether this would be burdensome is highly conjectural. The courts have correctly emphasized the desirability of prompt and expeditious payment of life insurance proceeds.[21] But some courts have said that since the insurance company might be fearful of subsequent liability to a legatee, it might delay payment to the named beneficiary.[22] However, we have already reasoned that such double liability is unlikely, and the companies presumably would reason similarly. Therefore, it is submitted that the uncertainty factor has been overstated by some courts.

If the court, in the absence of any compliance with formalities, does decide for the legatee, the insurance contract itself would be emasculated. Assuredly, the courts should, in general, uphold the binding character of valid contracts. Those situations in which contracts are voided or rendered nugatory ought to be carefully scrutinized. However, an individual purchasing life insurance certainly is not in a position to bargain with the company. What method he may use for changing the beneficiary is almost wholly within the dictates of the insurer. Here the insured had clearly indicated his desire to alter the contract of insurance, and the insurer was amply aware of that fact. Query: Do these facts justify setting aside the contract?

When the question of a testamentary change of beneficiary has been presented, the courts have followed one of two divergent theories. The first, restated by the majority of the court in the *Stone* case, is based on the necessity for compliance with the contractually defined procedures. The second, as espoused by the dissenting judges in the principal case, is that the insured's expressed intent ought to control the payment of the proceeds. It is the writer's view that the latter approach would have reached the better result on the facts presented by the *Stone* case. The purpose of the contract provisions regulating a change of beneficiary and the lucid expression of the insured's desire for a change are deemed to defeat the argument of the majority.

HERBERT A. MACK

20. Even at present, there exists uncertainty as to the payee, for upon an insured's death an insurance company must always be prepared for the claims of hitherto undisclosed assignees of the insurance proceeds.

21. Wannamaker v. Stroman, 167 S.C. 484, 166 S.E. 621 (1932) contains a representative statement of the uncertainty issue.

22. Parks' Ex'rs v. Parks, 288 Ky. 435, 156 S.W.2d 480, 483 (1941); Stone v. Stephens, 155 Ohio St. 595, 99 N.E.2d 766 (1951); Wannamaker v. Stroman, 167 S.C. 484, 166 S.E. 621 (1932).