ASSIGNMENTS IN INSURANCE LAW

Introduction

The concept of assignments in insurance law takes on many forms - firstly due to the various branches of insurance law and secondly due to the various components in an insurance transaction that can be assigned. The format of this discussion, therefore, is reflective of this framework.

Assignments are first discussed in the context of the following branches of insurance law:

(i) marine insurance,
(ii) property insurance,
(iii) motor insurance, and
(iv) life insurance.

The next stage of this discussion focuses on what may be assigned in an insurance transaction and how such assignments are legally effected, namely, the assignment of:

(a) an insurance policy,
(b) the proceeds of an insurance policy, and
(c) the subject matter of an insurance policy.

1.1 Nature of Insurance Policies

A. A. Tarr, Kwai-Lian Liew & W. Holligan writes:

> "The origins of insurance date back thousands of years. For example, a central feature of insurance, that of risk interference, was incorporated in commercial arrangements effected by the Babylonians,

> Phoenicians, Greeks and Romans. However, the infancy of the modern insurance contract is founded on the practices adopted by Italian merchants in the 14th century. These merchants fostered the development of marine insurance and were reluctant to accept the numerous and diverse risks associated with the mercantile adventure of transporting goods across the sea; an early policy entered into in 1385 insured a ship and cargo against loss arising 'from Acts of God, of the sea, of fire, of jettison, of confiscation by princes or cities or any other person, of reprisal, mishap or any other impediment'. Merchants in their relations with one another tended to uniformity on commercial matters and this tendency led to the rapid dissemination if marine insurance practices to other countries, and, in particular, to the low countries, Spain and England."[1]

Lord Hailsham of St. Marylebone writes:

> "Non-marine insurance first made its appearance in the form of life and fire insurance, but until the middle of the nineteenth century these three[2] types of insurance comprised, in practice, substantially the whole range of insurance."

The practice of taking insurance and property and later, lives, has a long and rich history. Unsatisfied with leaving the health and safety of property and lives to the capricious whims of fate alone, our ancestors have sought to 'hedge their bets' by entering into an insurance transaction.

John Lowry & Philip Rawlings writes:

> "The aim of insurance is to shift risk from one person (the insured) to another (the insurers): the owner of a house enters into a fire policy under which an insurer, in exchange for a premium paid by the insured, agrees to pay for damage caused to the property by fire."[3]

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[1] A. A. Tarr, Kwai-Lian Liew & W. Holligan, *Australian Insurance Law*, Second Edition, The Law Book Company Limited, 1991, at page 1.

[2] Namely marine, life and fire insurance.

[3] John Lowry & Philip Rawlings, *Insurance Law: Doctrines and Principles*, Hart Publishing (U.S.A), 1999, at page 3.

Professor K. S. N. Murthy & K. V. S. Sarma writes:

> "The aim of all insurance is to protect the owner from a variety of risks which he anticipates."[4]

John Birds and Norma J. Hird observe that:

> "It is suggested that a contract of insurance is any contract whereby one party assumes the risk of an uncertain event, which is not within his control, happening at a future time, in which event the other party has an interest, and under which contract the first party is bound to pay money or provide its equivalent if the uncertain event occurs."[5]

In *Rayner v Preston*[6], Brett L.J. explained the nature of a contract of insurance in the following terms:

> "Now, in my judgment, the subject-matter of the contract of insurance is money, and money only. The subject-matter of insurance is a different thing from the subject-matter of the contract of insurance. The subject-matter of insurance may be a house or other premises in a fire policy, or may be a ship or goods in a marine policy. These are the subject-matter of insurance, but the subject-matter of the contract is money, and money only. The only result of the policy, if an accident which is within the insurance happens, is a payment of money. It is true that under certain circumstances in a fire policy there may be an option to spend the money in rebuilding the premises, but that does not alter the fact that the only liability of the insurance company is to pay money. The contract, therefore, is a contract with regard to the payment of money, and it is a contract made between two persons, and two persons, only, as a contact."[7]

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[4] Professor K. S. N. Murthy & K. V. S. Sarma, *Modern Law of Insurance in India*, N. M. Tripathi Private Limited (Bombay, India), 1995, at page 3.

[5] John Birds & Norma J. Hird, Birds' *Modern Insurance Law*, Fifth Edition, Sweet & Maxwell (London), 2001, at page 13.

[6] (1881) 18 Ch.D 1.

[7] *Ibid* 9-10.

1.2 Assignment

Poh Chu Chai writes:

> "A contract of insurance constitutes a highly personal contract and as a general rule, such a contract is generally not assignable."[8]

The insurer fixes the premium after considering the particular risks associated with the property and handling of the property in the hands of the insured. As such, as a general rule, an insurance policy is not casually assignable to another party. Nevertheless, assignments are not an unheard of option in an insurance transaction.

Before embarking on the discovery of how assignments in insurance law can be legally effected, it may prove beneficial to consider the nature of what is meant by this phrase which takes centre stage in this discussion, an 'assignment'.

R. C. Kohli explains:

> "Transfer of interest from one to another is called assignment. In insurance also when rights and obligation under the contract are transferred from one to another, the same is called assignment of the policy. There can be another assignment in insurance which is **assignment of benefits** under the policies. Assignment of policy and assignment of benefits are quite distinct. Whereas in the former all the rights and obligations are transferred, in the latter only benefits (i.e. money due under the policy etc) are transferred. In insurance the assignment means assignment of rights under the contract. An assignee for all purposes becomes the owner of the policy and enjoys all rights thereunder. However, by assignment no change is made in the subject matter insured by the policy and it remains unaltered."[9]

David Norwood and John P. Weir writes:

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[8] *Principles of Insurance Law*, Fifth Edition, Butterworths Asia, 2000, at page 1193.

[9] R. C. Kohli, *An Introduction to Insurance Practice and Principles in Singapore and Malaysia*, Singapore Insurance Training Centre, 1982, at page 77.

> "There is no special form of assignment document, no magic words which must be used to create a valid and effective legal assignment. As was expressed in one case[10]: '[An assignment] ... may be addressed to the debtor. It may be couched in the language of command, It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is clear.'

The only important point is that the instrument recording the assignment must make it clear that one party with a contractual right against another party is transferring their right of enforcement of the obligations of the contract to another person."[11]

Malcolm A. Clarke writes :

> "Assignment must have been intended. Intention is ascertained by the substance rather than the form of what is said or done."[12]

2. Application of English Law

Another introductory matter which must be considered in this discussion is the source of law in the insurance arena in Malaysia.

The governing statute in Malaysia in the field of insurance law is the *Insurance Act 1996*[13]. This Act, however, does not seem to mention the issue of assigning insurance policies. As such, the provisions of the *Civil Law Act 1956*[14] may be referred to in order to provide valuable guidance on the matter.

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[10] *William Brandt's Sons & Co. v. Dunlop Rubber Co.* (1905) A.C. 454 (House of Lords) per Lord Macnaghten, at page 462.

[11] David Norwood & John P. Weir, Norwood on *Life Insurance Law in Canada*, Second Edition, Carswell Thomson Professional Publishing, 1993, at page 258.

[12] Malcolm A. Clarke, *The Law of Insurance Contracts*, Second Edition, Lloyd's of London Press Ltd, 1994, at page 170.

[13] Act 553.

[14] Act 67 (revised 1972).

2.1 Generally

Section 3 of the *Civil Law Act 1956* provides:

> "Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall -
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> (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956;...
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> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary."

Section 5(1) of the *Civil Law Act 1956* makes particular reference to life and fire insurance. This section provides that :

> "In all questions or issues which arise or which have to be decided in the States of West Malaysia ... with respect to the law of ... marine insurance, average, life and fire insurance ... the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act[15], if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law."

With the aid of these provisions, English law has often been referred to for guidance in resolving legal dilemmas in the field of insurance law and since the Malaysian Act on point does not seem to have covered the matter of the assignment of insurance policies, as will be discussed below, many academicians and Malaysian judges have relied on the principles enunciated in the English courts and Parliament on this matter.

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[15] This Act is declared to come into force on 7 April 1956.

2.2 Policies of Assurance Act 1867

There is one particular dilemma highlighted by Nik Ramlah Mahmood with regard to the applicability of the *Policies of Assurance Act 1867*[16] of England with regard to the legal assignment of life policies. As this author explains :

> "In England, a life policy can be legally assigned in accordance with the Policies of Assurance Act 1867 which deals specifically with such assignment or in accordance with section 136 of the Law of Property Act 1925[17] which deals with the assignment of a *chose in action.*[18]
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> ...

As there is no parallel local statute, the Policies of Assurance Act 1867 (UK) is assumed to be applicable in Malaysia and is generally regarded as the only basis for legal assignment of a life policy. The validity of this assumption, however, is questionable. There is in Malaysia a provision similar to section 136 of the Law of Property Act 1925 (UK). This is section 4(3) of the Civil Law Act 1956 which provides for the absolute assignment of a chose in action. The existence of this provision can have two possible effects on the law relating to legal assignment of life policies in Malaysia.

One possible effect is that contrary to popular belief and practice, the Policies of Assurance Act 1867 (UK) is in fact inapplicable in Malaysia. According to section 5 of the Civil Law Act 1856, an English Act like the 1867 Act can only be applied if there are no local statutory provisions on the related issue. As the assignment of a life policy is in fact the assignment of a chose in action and there is a local provision on this, there seems to be no valid justification for applying the Policies of Assurance Act 1867 in Malaysia.

The other possible effect is that there are, in Malaysia as in England, two different statutory provisions relating to the assignment of life

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[16] 30 and 31 Victoria, chapter 144.

[17] 15 and 16 Geo. V., chapter 20.

[18] A 'chose in action' has been defined by Erin Goh, Valerie Low and Low Kee Yang (editor) in Butterworths Law for Business Series - *Insurance Law*, Butterworths Asia, 2001, at page 191 in the following manner, "A chose in action is the right to demand payment of a sum of money or to recover damages under a contract."

policies, one under the Policies of Assurance Act 1867 (UK) and the other under the Civil Law Act 1956. As the Civil Law Act provision deals with the assignment of a chose in action generally, its existence should not prevent the application of an English statute which deals specifically with the assignment of life policies.

While a finding by a Malaysian court in favour of the first possible interpretation may alarm those in the insurance industry who have always regarded the Policies of Assurance Act 1867 of England to be the sole basis for the legal assignment of a life policy, such a finding may in the long term bring the practices of the industry in Malaysia in line with those in England where such assignments are now more commonly done under the Law of Property Act than under the Policies of Assurance Act."[19]

2.3 Marine Insurance Act 1906

There is no statute in Malaysia that deals exclusively with the area of marine insurance. As such, as Salleh Abas C.J. clarified in *The "Melanie" United Oriental Assurance Sdn. Bhd. Kuantan v. W.M. Mazzarol*[20] :

> "... we must refer to ... the Marine Insurance Act 1906 of the United Kingdom. This Act is made applicable to Malaysia as part of our law by virtue of section 5(1)[21] of our Civil Law Act 1956."[22]

3. Marine Insurance

The *Marine Insurance Act 1906*[23] contains a few sections dealing with the concept of assignment in marine insurance. Section 50 of this Act states :

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[19] Nik Ramlah Mahmood, *Insurance Law in Malaysia*, Butterworths, 1992, at pages 207-208.

[20] [1984] 1 MLJ 260 (Federal Court).

[21] Quoted and discussed above.

[22] [1984] 1 MLJ 260 (Federal Court), at page 264.

[23] 6 Edw 7, c. 41 (United Kingdom).

"(1) A marine policy is assignable unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss.

(2) Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

(3) A marine policy may be assigned by indorsement thereon or in other customary manner."[24]

Section 51 of this Act reads :

"Where the assured has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative.

Provided that nothing in this section affects the assignment of a policy after loss."[25]

In *Colinvaux's Law of Insurance*, section 51 of this Act is explained as having the effect such that :

"This rule is an obvious corollary of insurable interest: if the assignor loses insurable interest, the policy lapses and there is thus nothing to assign. In the converse case, where the assured assigns the policy without assigning the subject-matter, the assignee has no insurable interest and is thus unable to sue on the policy."[26]

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[24] Halsbury's Statutes of England and Wales, Fourth Edition, Volume 22, 2000 Reissue, Butterworths (London), 2000, at page 42.

[25] *Ibid* 43.

[26] Robert Merkin (Editor), *Colinvaux's Law of Insurance*, Sixth Edition, Sweet & Maxwell (London), 1990, at pages 405-406.

Section 15 of this Act provides :

> "Where the assured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there can be an express or implied agreement with the assignee to that effect. But the provisions of this section do not affect a transmission of interest by operation of law."[27]

4. Property Insurance

In the book, *Macgillivray & Parkington on Insurance Law - relating to all risks other than marine*[28], the position when the subject-matter insured is assigned is summarised as :

> "If the assured voluntarily parts with all his interest in the subject-matter of the insurance policy, the policy lapses since the assured no longer has any insurable interest and can have suffered no loss[29]. The assignment must, however, be complete[30] and if the assured retains any insurable interest he will be able to recover under the policy; thus, if he enters into a contract to convey the subject-matter and the subject-matter is lost or damaged, the assured can still recover even though the risk has passed to the purchaser[31]; until the vendor is

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[27] Halsbury's Statutes of England and Wales, Fourth Edition, Volume 22, 2000 Reissue, Butterworths (London), 2000, at page 25.

[28] Michael Parkington, Nicholas Leigh-Jones, Andrew Longmore & John Birds (Editors), *Macgillivray & Parkington on Insurance Law* - relating to all risks other than marine, Eighth Edition, Sweet & Maxwell (London), 1988, at pages 714-715.

[29] The cases quoted in support of this proposition in this book, at page 714 are Rayner v. Preston (1881) 18 Ch. D. 1, at page 7 per Cotton L.J, *Ecclesiastical Commissioners v. Royal Exchange Assurance Corporation* (1895) 11 TLR 476, *Robson v. Liverpool, London and Globe Insurance Co.* (1900) The Times, June 23, *Rogerson v. Scottish Automobile and General Insurance Co. Ltd.* (1931) 48 TLR 17, *Tattersall v. Drysdale* [1935] 2 K.B. 174 and *Boss and Hansford v. Kingston* [1962] 2 Lloyd's Rep. 431.

[30] The case quoted in support of this proposition, at page 714 of this book is *Forbes & Co. v. Border Counties Fire Office* (1873) 11 Macph. 278.

[31] The case quoted in support of this proposition in this book, at page 714 is *Collingridge v. Royal Exchange Assurance Corporation* (1877) 3 QBD 173.

> paid he cannot be certain of receiving the purchase price and it is in effect this risk which, in such a case, is the subject of insurance.[32] The policy will probably remain in force ever after conveyance if the purchase price has not been paid, provided that the vendor has not parted with his lien. The lien will ensure that the assured still has an insurable interest.[33] An assured who enters into a contract of sale will often agree to transfer the insurance policy and, if he effectively does so, the transferee will be able to recover under it."

Digby C. Jess writes:

> "Property and liability insurances are personal contracts, and do not run with the property if it is sold or otherwise disposed of or with a transfer of liabilities of the insured. Therefore, both at common law and equity, as assignment of a policy of insurance can only be valid of the insurer consents to this course, whereby, in truth a new contract of insurance is effected between the assignee and the insurer, and that between the assignor (the original insured) and the insurer lapses."[34]

In *The North of England Pure Oil-Cake Company v The Archangel Maritime Insurance Company,*[35] a firm insured a cargo of linseed to be transported by sea. The policy was to cover every stage of the voyage as if each stage of the voyage were separately insured and the policy of insurance was expressed to be for the benefit of the firm and

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[32] The cases quoted in support of this proposition in this book, at page 715 are *Castellain v. Preston* (1883) 11 QBD 380, at page 385 per Brett L.J. and *A.R. Williams Machinery Co. v. British Crown Assurance Corporation Ltd.* (1921) BCR 481.

[33] The case quoted in support of this proposition in this book, at page 715 is the judgment of Bowen L.J. in *Castellain v. Preston* (1883) 11 Q.B.D. 380, at pages 401 and 405. This author also comments that once the vendor is fully paid, however, his interest will cease and he will be unable to recover as was held in *Bank of New South Wales v. North British and Mercantile Insurance Co.* (1881) 2 NSWLR 239.

[34] Digby C. Jess, *The Insurance of Commercial Risks Law and Practice*, Second Edition, Butterworths (London), 1993, at page 15.

[35] (1875) LR 10 QB 249.

the assignees. During the voyage, the firm sold the cargo. Part of the cargo was sunk due to perils within the terms of the policy. Later, the firm assigned the policy to the purchasers of the linseed.

Cockburn C.J. in this case held :

> "We are agreed on one point, which entitles the defendants to judgment, viz. that, the policy not having been assigned until after the interest of the assignors had ceased, an effective assignment was impossible."[36]

In *Sadler's Company and Badcock,*[37] a lessee of a house insured the house from fire. After the lessee's lease expired but while the insurance policy was still in effect, the house burnt down. Following the destruction of the house, the lessee assigned the policy to the landlords. The landlords then attempted to claim the benefit of the policy from the insurance company.

The Lord Chancellor in this case decided that a policyholder could not assign a policy at a point in time when the policyholder does not have any interest in the insured property. The lessee in this case was not able to assign the policy since at the time the lessee purported to assign the policy the lessee had no longer any interest in the house. In the words of the judge :

> "And I am of opinion that the party insured ought to have a property in the thing insured at the time of the insurance made, and at the time of the loss by fire, or he cannot be relieved. Mrs. Strode [the lessee] had no property at the time of the fire, consequently no loss to her; and if she had no interest, nothing could pass to the plaintiffs [landlords] by assignment. ...
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> If the insured was not to have a property at the time of the insurance or loss, any one might insure another's house, which might have a bad tendency to burning houses. Insuring the thing from damage is

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[36] (1875) LR 10 QB 249, at page 253.

[37] (1743) 1 Wils. KB 10; 95 ER 463.

> not the meaning of the policy, it must mean insuring Mrs. Strode from damage, and she has suffered none."[38]

In *The Ecclesiastical Commissioners for England v The Royal Exchange Assurance Corporation,*[39] one ecclesiastical body sold a farm that was covered by a fire insurance policy to another ecclesiastical body. At the time of the sale, no mention was made about the assignment of the policy. After the sale, the farm burnt down and the purchaser seeks to claim on the policy.

The insurance company argues that there was no valid assignment of the policy and as such, the insurance company is not liable to the seller since the seller had no interest in the insured property and thus have no insurable interest at the time of the accident nor the purchaser since the policy has not been validly assigned to the purchaser. Charles J. in this case agreed with the arguments of the insurance company and held:

> "The whole transaction was complete. Can anybody sue? The Commissioners [seller] cannot sue because there has been no assignment of the policy to them. ... In this case the vendors have conveyed away their property and received their consideration ... I must therefore give judgment for the defendants [insurance company], with costs."[40]

In *Collinridge v The Royal Exchange Assurance Corporation,*[41] a company which owned a number of buildings insured the same against fire. These buildings were indeed destroyed by fire. However, before the fire took place, these buildings were in the process of being acquired by the Metropolitan Board of Works. There was no mention of an accompanying assignment of the fire insurance policy. The Board had yet to make payments for the conveyance. The insurance company disputes liability.

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[38] (1743) 1 Wils. KB 10, at page 10; 95 ER 463, at page 463.

[39] (1895) 11 TLR 476 (High Court).

[40] *Id* 476.

[41] (1877) 3 QBD 173.

Mellor J. in this case held:

> "It appears that the plaintiff at the time of the fire was in the position of unpaid vendor, and had possession of his premises. Under these circumstances, I think there is nothing to prevent him from bringing an action to recover the amount which he has insured."[42]

Lush J. in this case concurred :

> "The plaintiff is in the position of a person who has entered into a contract to sell his property to another. ... The contract will no doubt be completed, but legally the buildings are still his property. The defendants [insurance company] by their policy undertook to make good any loss or damage to the property by fire. There is nothing to shew that any collateral dealings with the premises, such as those stated in this case, are to limit his liability. If the plaintiff had actually conveyed them away before the fire, that would have been a defence to the action, for he would have then have had no interest at the time of the loss. But in the present case he still has a right to the possession of his property, and the defendants are bound to pay him the insurance money ..."[43]

In *Rayner v Preston,*[44] a set of buildings covered by a fire insurance policy were contracted to be sold. After the date the contract was signed but before the contract was completed, the buildings were damaged by fire. The contract contained no mention of the fire insurance policy. The insurance company made payments to the seller of the buildings. The purchaser seeks to claim this money or to compel the seller to apply the money received towards making repairs to the buildings.

The first argument proposed by the purchaser was that although the contract made no specific mention of the insurance policy, the contract gave the purchaser a right to all contracts related to the buildings. Cotton L.J. in this case was not in support of this contention and held :

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[42] *Ibid* 176-177.

[43] *Ibid* 177.

[44] (1881) 18 Ch.D 1.

> "The contact passes all things belonging to the vendors appurtenant to or necessarily connected with the use and enjoyment of the property mentioned in the contract, but not, in my opinion, collateral contracts; and such, in my opinion, ... the policy of insurance is. It is not a contract limiting or affecting the interest of the vendors in the property sold, of affecting their right to enforce the contract of sale, for it is conceded that, if there were no insurance and the buildings sold were burnt, the contract for sale would be enforced. It is not even a contract in the event of a fire to repair the buildings, but a contract in that event to pay the vendors a sum of money which, if received by them, they may apply in any way they think fit. It is a contract, not to repair the damage to the buildings, but to pay a sum not exceeding the sum insured or the money value of the injury. In my opinion, the contract of insurance is not of such a nature as to pass without apt words under a contract for sale of the thing insured."[45]

The next argument proposed by the purchaser was that between the time of the contract being made and the conveyance being completed, the seller was a trustee of the property for the purchaser and as such, the seller is a trustee for the purchaser with regard to the money received for the property during this period of trusteeship. This argument did not find favour with the court either and Cotton L.J. held:

> "An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contact which a Court of Equity will give effect to by transferring the property sold to the purchaser, and so far as he is a trustee he is so only in respect of the property contracted to be sold. Of this the policy is not a part. A vendor is in no way a trustee for the purchaser of rents accruing before the time fixed for completion, and here the fire occurred and the right to recover the money accrued before the day fixed for completion. The argument that the money is received in respect of the property which is trust property is, in my opinion, fallacious."[46]

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[45] *Ibid* 6.

[46] *Ibid* 6-7.

Brett L.J. in this case concurred :

> "... I venture to say that I doubt whether it is a true description of the relation between the parties to say that from the time of the making of the contract, or at any time, one is ever trustee for the other. They are only parties to a contract of sale and purchase of which a Court of Equity will under certain circumstances decree a specific performance. But even if the vendor was a trustee for the vendee, it does not seem to me at all to follow that anything under the contract of insurance would pass. As I have said, the contract of insurance is a mere personal contact for the payment of money. It is not a contract which runs with the land. If it were, there ought to be a decree that upon completion of the purchaser the policy be handed over. But that is not the law. The contract of insurance does not run with the land; it is a mere personal contract, and unless it is assigned no suit or action can be maintained upon it except between the original parties to it...[47]
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> "I therefore, with deference, think that the Plaintiffs here [purchaser] cannot recover from the Defendant [seller], on the ground that there was no relation of any kind or sort between the Plaintiff and the Defendant with regard to the policy, and therefore none with regard to any money received under the policy."[48]

James L.J. in this case gave a dissenting judgment on this point and held that :

> "... the relation between the vendor and the purchaser became, and was in law, as from the date of the contract and up to the completion of it, the relation of trustee and *cestui que trust*, and that the trustee received the insurance money by reason of and as the actual amount of the damage done to the trust property."[49]

In *Castellain v Preston and Others,*[50] the defendants owned a piece of land and buildings which were covered by a fire insurance policy.

[47] (1881) 18 Ch.D 1, at page 11.

[48] *Ibid* 12.

[49] *Ibid* 16.

[50] (1883) 11 QBD 380 (Court of Appeal).

The defendants entered into negotiations to sell the premises to their tenants. In the midst of these negotiations, a fire broke out which damaged a part of the buildings. By the time of the fire the contract of sale was signed, a deposit was paid but the contract was not completely performed as yet. The insurance company made payments to the defendants on the insurance policy for the fire. The tenants paid the full purchase price and proceeded with the slae despite the fire. The insurance company brings the present action.

Brett L.J. commented on the foundation of insurance law :

> "The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong."[51]

Cotton L.J. added :

> "The policy is really a contract to indemnify the person insured for the loss which he has sustained in consequence of the peril insured against which has happened, and from that it follows, of course, that as it is only a contract of indemnity, it is only to pay that loss which the assured may have sustained by reason of the fire which has occurred. In order to ascertain what that loss is, everything must be taken into account which is received by and comes to the hand of the assured, and which diminishes the loss. It is only the amount of the loss, when it is considered as a contract of indemnity, which is to be paid after taking into account and estimating those benefits or sums of money which the assured may have received in diminution of the loss...[52]

[51] (1883) 11 QBD 380 (Court of Appeal), at page 386.

[52] *Ibid* 393.

> Therefore the conclusion at which I have arrived is, that if the purchase-money has been paid in full, the insurance office will get back that which they have paid, on the ground that the subsequent payment of the price which had been before agreed upon, and the contract for payment of which was existing at the time, must be brought into account by the assured, because it diminishes the loss against which the insurance office merely undertook to indemnify them[53]."

5. Motor Insurance

Mahinder Singh Sidhu observes :

> "An assignment of the policy means a 'change of interest' i.e., somebody else is substituted for the original insured in the motor insurance contract. All motor policies can be validly assigned but the insurer's prior consent is essential."[54]

Mahinder Singh Sidhu also writes :

> "A motor insurance contract is always personal in the sense that some human element is inevitably involved, and in a technical sense, the insurer's decision to enter on the contract depends on the personal qualities of the insured and the insurer's confidence in him. The insurers have the right to question and investigate the proposed insured and vary the terms of the contract. If an assignment takes place it is termed as a "novation", since the assignment virtually creates a new contract with the assignee.
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> A valid assignment gives the assignee the right to sue and gives the insurance company a good legal discharge without the necessity of joining the assignor. Where there is a conditional sale of a car to the new purchaser, the ownership of the car still remains with the insured, and does not amount to any transfer of his insurable interest. But where there has been a complete sale and transfer of the vehicle and handing over of the policy documents to the purchaser, it does

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[53] *Ibid* 396-397.

[54] Mahinder Singh Sidhu, *Casebook on Motor Insurance Law in Malaysia and Singapore* - with synopsis and principles, International Law Book Services, 1995, at page 25.

> not create a valid assignment, though there is a transfer of interest of the subject matter of the insurance. The transfer of the insurable interest causes the policy to lapse, and the purchaser has no insurance cover if he drives the car and meets with an accident."[55]

In *Peters v General Accident Fire & Life Assurance Corporation Ltd.*[56], the owner of a motor van sold the vehicle to another person and purportedly assigned the motor insurance policy for the van to the purchaser. After the sale, the purchaser was involved in an accident and attempted to make a claim to the insurance company based on the motor insurance policy purportedly assigned. The insurance company disputed the purchaser's right to claim under the insurance policy issued to the seller of the van.

Sir Wilfred Greene M.R. in this case decided that:

> "Assuming in his favour that there was an intention to assign the policy, the fundamental remains : Is this policy one which is capable of assignment? The judge held that it was not, and I am in entire agreement with that."[57]

The effect of the motor insurance policy was that the insurance company undertook to indemnify the policyholder in the case of an accident while the car was driven by the policyholder or anyone else driving the vehicle with the policyholder's consent or permission.

Sir Wilfred Greene M.R. explained the effect of deciding that such a policy was assignable:

> "It appears to me as plain as anything can be that a contract of this kind is in its very nature not assignable. The effect of the assignment, if it were possible to assign, was ... that, from and after the assignment, the name of Mr. Pope, the assignee [the purchaser], would

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[55] *Ibid* 31.

[56] [1938] 2 All ER 267 (Court of Appeal).

[57] *Ibid* 269.

> have taken the place of that of Mr. Coomber [the seller] in the policy, and the policy would have to be read as though Mr. Pope's name were mentioned instead of Mr. Coomber's. In other words, the effect of the assignment would be to impose upon the insurance company an obligation to indemnify a new assured, or persons ordered or permitted to drive by that new assured. That appears to be altering *in toto* the character of the risk under a policy of this kind. The risk that A.B. is going to incur liability by driving his motor car, or that persons authorised by A.B. are going to cause injury by driving his motor car, is one thing. The risk that C.D. will incur liability by driving a motor car, or that persons authorised by C.D. will incur liability through driving a motor car, is, or may be, a totally different thing."[58]

One reason given by Sir Wilfred Greene M.R. for deciding that an insurance policy of this kind was not capable of assignment was that :

> "The insurance company in this case, as in every case, make inquiries as to the driving record of the person proposing to take out a policy of insurance with them. The business reasons for that are obvious, because a man with a good record will be received at an ordinary rate of premium and a man with a bad record may not be received at all, or may be asked to pay a higher premium. The policy is, in a very true sense, one in which there is inherent a personal element of such a character as to make it, in my opinion, quite impossible to say that the policy is one assignable at the volition of the assured."[59]

The second reason given by the judge as the basis of his judgement was that the according to the *Road Traffic Act 1930*[60] in the United Kingdom, it is unlawful for anyone to use a motor vehicle or permit anyone else to use the motor vehicle unless that user or other person permitted by the user is covered by a motor insurance policy for the use of the motor vehicle.[61] Additionally under the statute, if a judgment is obtained in respect of a liability covered by the policy against any

[58] *Ibid* 269-270.

[59] *Ibid* 270.

[60] The equivalent Act in Malaysia is the Road Transport Act 1987 (Act 333).

[61] Refer to section 35 of the United Kingdom Act and section 90 of the Malaysian Act.

person insured by the policy, then the insurance company is generally liable to make the required payment to the person who has the benefit of the judgment.[62]

The purchaser of the car in this case argued that he was driving the car with the permission of the policyholder[63] and as such, should receive the same benefit of coverage in terms of the insurance policy. Based on this rationale, the purchaser argued that since judgment was obtained against him in respect of the accident and since he was covered by the policy, the insurance company should be liable under the judgment and make payments to the party who obtained the judgment. The court, however, held that :

> "At the date when the accident took place, the entire property in this car was vested in Pope [the purchaser]. He had bought the car. On the sale of the car, the property passed to him ... The property, therefore, passed to the purchaser long before this accident took place. The circumstance that he had not paid the whole of the purchase price is irrelevant for that purpose, because that circumstance does not leave in the vendor, Mr. Coomber, any interest in the car. There is no vendor's lien, or anything of that sort. The car had become the out-and-out property of Pope. When Pope was using that car, he was not using it by the permission of Coomber [the seller]. It is an entire misuse of language to say that. He was using it as owner, and by virtue of his rights as owner, and not by virtue of any permission of Coomber."[64]

In *Smith v Ralph*,[65] the scenario was basically the same as above, namely, that the purchaser of a motor vehicle again tried to claim the coverage of the insurance policy issued to the seller of the motor vehicle on the basis that the purchaser was driving the motor vehicle with the permission or consent of the policyholder.

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[62] Refer to section 10 of the United Kingdom Act and section 91 of the Malaysian Act.

[63] Who was the seller of the car.

[64] [1938] 2 All ER 267 (Court of Appeal), at pages 270-271.

[65] [1963] 2 Lloyd's Rep. 439 (High Court).

Lord Parker of Waddington C.J. in this case similarly held that the purchaser was not covered by the policy as the policyholder could not assign any rights in the policy when he no longer had any interest in the vehicle covered by the policy. In the words of the judge :

> "Any permission or authority given by the policyholder ... could not extend beyond the time when he ceased to be a policyholder in the sense of having any insurable interest."[66]

In *Nanyang Insurance Co. Ltd. v. Salbiah & Anor,*[67] a car was bought on behalf of a company. The company then entered into negotiations to sell the car to the purchaser. The terms of the proposed sale in the written contract included the obligation of the purchaser to make an initial payment and thereafter to continue paying for the car in instalments. The parties varied this term by oral agreement when the purchaser did not make this initial payment in full by allowing him to make this initial payment in instalments. The car was involved in an accident and judgment was obtained against the driver of the car who was the purchaser. The insurance company disputed liability for the claim against them to honour the judgment obtained as they argued that the seller of the car no longer had any insured interest with the proposed sale of the car and as such, the insurance policy has lapsed.

Azmi C.J. in this case held:

> "It is therefore quite clear in my view from the evidence, that the company intended to retain the property in the car until Abdul Karim [the purchaser] has paid in full the initial payment of $1,000 under the D.6 [the contract] when he could execute a hire-purchase agreement with a financial company. ...

For the above reason, I would therefore with respect, agree with the finding of the trial judge that the appellants [seller] had an insurable

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[66] [1963] 2 Lloyd's Rep. 439 (High Court), at page 440.

[67] [1967] 1 MLJ 94 (Federal Court).

interest in the car on the date of the accident and the car was being driven by Abdul Karim with the permission of the insured."[68]

In *People's Insurance Co. of Malaya Ltd. v Ho Ah Kum & Anor*,[69] the driver of a van was sued by the estate of a deceased who was killed in an accident due to the negligent driving of this driver. The estate of the deceased obtained judgment against the driver of the van. The driver, it was alleged, was driving the van with the permission of the owner of the van who had an insurance policy on the van. The question that arose in this case was whether the driver was so driving with the permission of the owner or whether the owner of the van had sold the van to the driver and as such parted with possession of the van before the date of the accident.

The driver was actually an employee of the owner of the van who at the time of the accident was using returning from a delivery made on behalf of the employer in the course of his employment. The evidence showed that the owner told the driver that the ownership of the van would not be transferred unless and until the driver made full payment of the purchase price. The owner was aware that the reason the driver bought the van was to use the van in making these deliveries.

Wee Chong Jin C.J. in this case held on the facts that:

> "In any event, having regard to the relationship between Foo [driver] and Yeo [owner] throughout the material times; to the purpose for which Foo agreed to purchase from Yeo the motor van; and most important of all to the uncontradicted evidence of Foo that when the accident occurred he was returning after delivering Yeo's flour and there being no evidence to the contrary, I take the view that there is sufficient evidence on the record for me to find and I do find that at the time of the accident Foo was driving the van on the order of the insured."[70]

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[68] *Ibid* 96.

[69] [1967] 2 MLJ 134 (Federal Court).

[70] *Ibid* 136.

In *Tattersall v. Drysdale,*[71] the driver of a car was involved in an accident and judgment was obtained against him. The driver had an insurance policy with the London & Edinburgh Insurance Company for a Standard Swallow Saloon car. This Standard car was sold to a company who was in turn selling the driver a Riley Saloon car belonging to the director of this company which was under a Lloyd's Eclipse insurance Policy. The driver was in the process of having his insurance company, the London & Edinburgh Insurance Company, cover the Riley car and no longer cover the Standard car. However, this change was not made before the accident as yet. The question that arose was which insurance company was liable for the accident.

Goddard J. in this case held :

> "As to the question of permission, I am clearly of opinion that he was driving with Gilling's [the director of the company the Riley car was bought from] permission. ... The truth is that no bargain about insurance was ever made. Gilling, on handing over his car after the bargain had been made, wished the plaintiff [driver] to insure it and he was willing to do so, but he was allowed to drive it as he wished ..."[72]

Both insurance policies contained a clause that coverage is extended to indemnify a person driving the insured car with the assured's permission provided that the driver is not entitled to indemnity under any other insurance policy. The next question that arose, as such, was whether the Riley car was covered by the insurance policy of the driver. The judge held that it did not. This insurance policy was stated to cover the Standard car which had been sold. The Riley car was not entered on this policy. The coverage was extended to the situation when the assured drove another car temporarily but it is the car stated in the policy which is the subject of the insurance. As such, this insurance policy in the name of the driver lapsed when the car the

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[71] [1935] 2 KB 174.

[72] *Ibid* 178.

insurance policy was stated to cover, namely the Standard car, was sold.

The driver held to be driving the Riley car with the permission of the assured, namely the director of the company who owned this car with an insurance policy, the judge went on to direct that the insurance company of the director, namely, the Lloyd's Eclipse insurance Policy, through the extension clause discussed above, covered the driver of the Riley car and as such, was liable on the judgment obtained for the accident.

In *Roslan bin Abdullah v. New Zealand Insurance Co. Ltd,*[73] there was a collision between 2 trucks. Judgment was obtained and the appellant then sought to claim against the insurance company who had issued an insurance policy on the respondent's truck. The insurance company disputed liability as the judgment obtained was not entered against the assured as the assured was the previous owner of the truck and not the current owner, the respondent company.

Wan Suleiman F.J.[74] in this case, with regard to whether there was any assignment or novation of the insurance policy from the previous owner to the new owner, affirmed the following principles from the judgment of Goddard J. in *Peters v General Accident Fire & Life Assurance Corporation Ltd.*[75]

Goddard J. (as he then was) held:

> (a) when the vendor sold the car, the insurance policy automatically lapsed.
> (b) at the time of the accident, the purchaser could not be said to be driving the car by the order or with the permission of the vendor, as the car was then the purchaser's property.
> (c) the insured is not entitled to assign his policy to a third party. An insurance policy is a contract of personal indemnity, and the insurer cannot be compelled to accept responsibility in respect of a third party who may be quite unknown to them."[76]

[73] [1981] 2 MLJ 324 (Federal Court).

[74] This judgment was delivered by Lee Hun Hoe C.J. (Borneo).

[75] [1937] 4 All ER 628 (High Court). Discussed above is the Court of Appeal judgment.

[76] [1981] 2 MLJ 324 (Federal Court), at page 325.

Wan Suleiman F.J., with regard to whether the driver, as an employee of the current owner of the truck was driving with the permission of the previous owner of the truck, held :

> "We are informed by counsel for the appellant that Wee & Wee Realty Sdn. Bhd. [the previous owner of the truck] and United Malaysia Co. Ltd. [the current owner of the truck] the second defendant in C.S. K.124/76 are sister companies. Be that as it may they are distinct entities. The respondents were no longer the owners of the truck and therefore there cannot be any question of them ordering or permitting the first defendant [employee of the current owner of the truck] in C.S. K.124/76 to drive it."[77]

6. Life Insurance

S. Santhana Dass writes :

> "Life insurance seeks to reduce the financial uncertainties arising from the natural contingencies in old age and death and to ease the burden in the case of possible misfortunes - injury and sickness. The principal function of life insurance business is to furnish protection against the financial needs which may be caused by disability and death. It provides food, shelter and clothing, when illness, injury or death cuts off the income of the breadwinner."[78]

In the book, *Colinvaux's Law of Insurance*, it is written:

> "Life policies are to be considered something more than a contract. They are treated as securities for money payable at an uncertain but future date which is bound to occur."[79]

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[77] *Ibid* 325.

[78] S. Santhana Dass, *Law of Life Insurance in Malaysia*, Alpha Sigma Sdn Bhd, 2000, at page 1.

[79] Robert Merkin (Editor), *Colinvaux's Law of Insurance*, Sixth Edition, Sweet & Maxwell (London), 1990, at page 178.

Robert J. Surridge, Sara Forrest, Noleen Dignan, Alison Broadberry & Duncan Backus writes :

> "A practical definition might be that a life assurance contract is one whereby one party (the insurer) undertakes for a consideration (the premium) to pay money (the sum assured) to or for the benefit of the other party (the assured) upon the happening of a specified event, where the object of the assured is to provide a sum for himself or others at some future date, or for others in the event of his death."[80]

Robert J. Surridge, Sara Forrest, Noleen Dignan, Alison Broadberry & Duncan Backus also write with regard to the assignment of life policies that :

> "An assignment of a life policy is a document or action which is effective to transfer the ownership of the policy from one person to another. Assignments may be made for a variety of reasons, including:
> - Sale of exchange;
> - Gift or voluntary transfer;
> - Settlement, transferring the policy to trustees to give effect to successive or contingent interests;
> - Transfer to existing trustees of a settlement or to beneficiaries in pursuance of the trusts;
> - Mortgage; transfer of mortgage; or reassignment on repayment;or
> - Assignment to a trustee for the benefit of creditors."[81]

Nik Ramlah Mahmood writes:

> "In relation to life insurance, an assignment means the transfer of one's interest in the policy to another. Such an assignment commonly happens when an insured under an own life policy uses the policy, which is a valuable piece of property, as security for a loan

[80] Robert J. Surridge, Sara Forrest, Noleen Dignan, Alison Broadberry & Duncan Backus, Houseman and Davies *Law of Life Assurance*, Eleventh Edition, Butterworths (London), 1994, at page 1.

[81] *Ibid* 262

> and assigns it to the creditor. This usually takes the form of a conditional assignment whereby the policy would be reassigned to the insured once he has paid all his debts. Banks and other credit-giving institutions which lend huge sums of money to individuals normally insist that the borrower takes out a policy on his life and assigns it to them as security for the loan.

A life policy can also be unconditionally or absolutely assigned either as a gift or under a contract of sale. Such an assignment is absolute and does not leave any residual rights with the assignor."[82]

In *Dalby v. The India and London Life-Assurance Company,*[83] the Anchor Life-Assurance Company insured the life of his late Royal Highness, the Duke of Cambridge. This policy was effected by Wright on behalf of the company.

Parke B. stated in this case:

> "The contract commonly called life-assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, - the amount of the annuity being calculated, in the first instance, according to the probable duration of the life; and when once fixed, it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bonuses have been given by prosperous offices) the same, on the other. This species of insurance in no way resembles a contract of indemnity.
>
> Policies of assurance against fire ands against marine risks, are both properly contracts of indemnity, - the insurer engaging to make good, within certain limited amounts, the losses sustained by the assured in their buildings, ships, and effects..."[84]

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[82] Nik Ramlah Mahmood, *Insurance Law in Malaysia*, Butterworths, 1992, at page 206.

[83] (1854) 15 CB 365; 139 ER 465.

[84] *Ibid* page 387; 139 ER 465, at page 474.

> ... a contract of indemnity only. But that is not of the nature of what is termed an assurance for life; it really is what it is on the fact of it, - a contract to pay a certain sum in the event of death[85]."

S. Santhana Dass points out that:

> "An assignee under a life insurance contract can re-assign the policy to the original owner."[86]

6.1 Legal Assignment

The *Policies of Assurance Act 1867*[87] defines a life insurance policy as "... 'any instrument by which the payment of moneys, by or out of the funds of an assurance company, on the happening of any contingency depending on the duration of human life, is assured or secured'.[88]"

The *Policies of Assurance Act 1867* provides that an assignee can sue in his own name if[89]:

(i) the assignee has the right in equity to receive and the right to give a valid discharge to the assurance company for the policy money, that is, it was a precondition that the assignee be beneficially entitled to the policy money or entitled to receive the policy money as a trustee or mortgagee at the time of the claim;
(ii) the assignee has obtained an assignment, either by endorsement on the policy or by separate instrument, in the words or to the effect set forth in the Schedule to this Act; and

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[85] (1854) 15 C.B. 365, at page 391; 139 E.R. 465, at page 476.

[86] S. Santhana Dass, *Law of Life Insurance in Malaysia*, Alpha Sigma Sdn Bhd, 2000, at page 287.

[87] An Act in the United Kingdom.

[88] Robert J. Sumridge, Sara Forrest, Noleen Dignan, Alison Broadberry & Duncan Backus, Houseman and Davies *Law of Life Assurance*, Eleventh Edition, Butterworths (London), 1994, at page 263.

[89] *Ibid.*

(iii) written notice of the assignment had been given to the insurance company.

Cotton L.J. in the case *In re Turcan*[90] commented :

"Before the Act of 1867[91] (30 & 31 Vict. C. 144) a policy could not be assigned at law, but now it can ..."[92]

Section 4(3) of the *Civil Law Act 1956*[93] states :

"Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act[94], to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor."

S. Santhana Dass has summarised the requirements under section 4(3) of the *Civil Law Act 1956* in order to effect a legal assignment of a life insurance policy as follows :

"The requirements for an absolute assignment of a life policy are as follows:-

(a) the assignment must be in writing and signed by the assignor (the insured);
(b) it must be absolute and not by way of charge only; and

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[90] (1888) 40 Ch.D 5.

[91] The Policies of Assurance Act 1867.

[92] (1888) 40 Ch.D 5, at page 10.

[93] Act 56.

[94] This Act came into force in West Malaysia on 7 April 1956.

(c) notice in writing of the assignment must be given to the insurer."[95]

S. Santhana Dass goes on to explain:

"The common practice amongst insurers with respect to assignments (be it under the *Section 4(3)* of the *Civil Law Act 1956* or the *Policies of Assurance Act 1867 (U.K.)* can be summarised as follows:-

(i) An assignment should be in writing and a life policy can be assigned absolutely or conditionally.
(ii) The written notice of assignment must be sent to the Head Office or the Principal Office of the insurer.
(iii) Upon receipt of the assignment notice the insurer registers each notice.
(iv) If there is no written notice given to the insurer and the insurer has made payment to a person other than the assignee, the insurers shall not be liable to the assignee thereafter. The assignee cannot sue the insurer for recovery of any benefit under the policy unless a notice of assignment has been sent to the insurer.
(v) An assignment can be done by effecting an endorsement and attaching it to the back of the policy. Otherwise it is effected by a separate deed signed by all parties concerned *i.e.* the assignor, assignee and the insurer.
(vi) If there is more than one assignment, the priority of claims by the assignor will depend upon the priority in the date of receipt of the notice by the insurer. Thus position has now been altered by *Section 168(2)* of the *Insurance Act 1996* where priority is based on the date of the assignment rather than date of the notice."[96]

6.2 Equitable Assignment

Robert J. Surridge, Sara Forrest, Noleen Dignan, Alison Broadberry & Duncan Backus writes:

[95] S. Santhana Dass, *Law of Life Insurance in Malaysia*, Alpha Sigma Sdn Bhd, 2000, at page 276.

[96] *Ibid* 281-282.

"Where there has not been a legal assignment but the assignee has given *consideration*, equity will (subject to the riles on priority) assist him to perfect his title against third parties, even though he may not have obtained formal assignment.

If, however, a *voluntary* assignee seeks the support of equity, he will succeed only where:

(1) the assignment is complete between assignor and assignee, ie everything necessary has been done to make a present transfer and render the assignment binding; or
(2) the assignor has constituted himself as trustee for the assignee."[97]

Roy Hodgin writes :

"Assignment can be made in equity ... commonly, under the Policies of Assurance Act 1867, which requires that notice of such assignment be given in writing to the insurer. Under the 1867 Act, the assignment may be made either by an endorsement on the policy or by a separate document using the wording set out in the Schedule to the Act."[98]

Cohen L.J. in *Inland Revenue Commissioners v. Electric and Musical Industries, Ltd.*[99] explained :

"It is quite true that as a matter of law there is no special form required to constitute an equitable assignment. Whether or not what has been done in any particular transaction amounts to an equitable assignment is a matter of inference from the facts and documents concerned ..."[100]

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[97] Robert J. Surridge, Sara Forrest, Noleen Dignan, Alison Broadberry & Duncan Backus, Houseman and Davies *Law of Life Assurance*, Eleventh Edition, Butterworths (London), 1994, at page 265.

[98] Ray Hodgin, *Insurance Law - Text and Materials*, Cavendish Publishing Limited (United Kingdom), 1998, at page 63.

[99] [1949] 1 All ER 120 (Court of Appeal).

[100] *Ibid* 126.

Nik Ramlah Mahmood writes:

> "There is no specific method of effecting an equitable assignment of a life policy. The only important requirement is that there must be a clear indication that the object of the transaction is to transfer the benefits in the policy from one party to another. No written document is necessary. A common way of effecting an equitable assignment is by the assignor depositing the policy of insurance with the assignee. An equitable assignee cannot enforce his rights directly against the insurer in his own name, he must either compel the assignor to sue on his behalf or sue the assignor and join the insurer to the action. The equitable assignee is thus not in a position to give a legal disharge to the insurer."[101]

6.3 Incomplete Assignment

Tan Lee Meng writes:

> "For the assignor to claim under the policy, the assignment must be complete."[102]

In the case *In re Williams*[103], an owner of an insurance policy paid the insurance premiums until his death. The court had to construe a purported assignment of the policy to his housekeeper through the following signed endorsement:

> "'I authorise Ada Maud Ball, my housekeeper and no other person to draw this insurance in the event of my predeceasing her this being my sole desire and intention at time of taking this policy out and this is my signature.'"[104]

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[101] Nik Ramlah Mahmood, *Insurance Law in Malaysia*, Butterworths, 1992, at pages 206-207.

[102] Tan Lee Meng, *Insurance Law in Singapore*, Second Edition, Butterworths Asia, 1997, at page 415.

[103] (1917) 1 Ch.D 1 (Court of Appeal).

[104] *Ibid* 2.

Lord Cozens-Hardy M.R. held:

> "According to my construction it is not an assignment at all. The question whether in the circumstances there is a voluntary gift always involves the consideration not whether the donor might have given the property, but what is the form in which he has purported to give it. Take the case of shares in a limited company which are only transferable by deed, or the case of Consols which are only transferable at the Bank of England; it is quite clear that a mere letter not under seal in either of these cases purporting to assign the property would not have been complete, the donor would not have done all he could to perfect it, and the intended gift would have failed. Of course if there had been valuable consideration for the assignment the position would have been different."[105]

Warrington L.J. in this case agreed:

> "The assignee in the present case is a volunteer, and she claims to have received in the assignor's lifetime the gift of a certain chose in action, namely, a policy of insurance, the amount secured by which is in its nature only to be paid on the death of the assured. It is a policy on the assignor's own life. Claiming as she does as a volunteer and alleging that the assignor made this gift to her, she can only succeed if she can show that the assignor did everything which according to the nature of the property comprised in the assignment was necessary to be done in order to transfer the property and render the assignment binding upon him. ...
>
> The question turns largely if not entirely on the construction of the document. Of course the mere form of words is immaterial if the assignor has used any form of words which expressed a final and settled intention to transfer the property to the assignee there and then. That would be sufficient. He need not use the word "give" or "assign" or any particular words."[106]

Warrington L.J. construed the words of the endorsement and came to the conclusion that it merely created a revocable authority to receive

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[105] *Ibid* 7.

[106] *Ibid* 8.

the policy money after the assignor's death which was a nullity as the authority would be revoked by the assignor's death[107]. Lord Cozens-Hardy M.R. similarly construed the endorsement as either a mere:[108]

- power of attorney, though not under seal, authorising the person named to receive the money which power becomes inoperative on the death of the person conferring it; or
- mandate which ceased to be operative at death.

6.4 Priorities

In *Newman v. Newman,*[109] section 3 of the *Policies of Assurance Act 1867* was construed. This section states:

> "No assignment made after the passing of this Act of a policy of life assurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the amount of such policy, or the moneys assured or secured thereby, until a written notice of the date and purport of such assignment has been given to the assurance company liable under such policy at its principal place of business for the time being; and the date on which such notice was received shall regulate the priority of all claims under any assignment; and a payment bona fide made in respect of any policy by any assurance company before the date on which such notice was received shall be as valid against the assignee giving such notice as if this Act had not been passed."[110]

North J. in this case interpreted this section in the following manner:

> "That Act was passed in order to avoid the necessity of joining the assignor of the policy in actions against the insurance office, and it

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[107] *Ibid* 8.

[108] *Ibid* 7.

[109] (1885) 28 Ch.D 674.

[110] Poh Chu Chai, *Principles of Insurance Law*, Fifth Edition, Butterworths Asia, 2000, at page 1208.

> provides that if a certain notice is given to the office then the assignee may sue without joining the assignor. Then these words occur 'And the date on which such notice shall be received shall regulate the priority of all claims under any assignment.' It was contended that these words went much further than was necessary for the protection of the insurance office, and affected the rights of the parties *inter se*. ... In my opinion that is not the meaning of the statute, which was not intended to give a simpler remedy against an insurance office, and also to give facilities to insurance offices in settling claims by enabling them to recognise as the first claim the claim of the person who first gave such notice as required by the statute. It was not intended in my opinion to enact that a person who had advanced money upon a second charge without notice of the first, and made subject to it, should be giving statutory notice of the office exclude the person who had the prior incumbrance."[111]

In *Spencer v. Clarke*[112], a life insurance policy was used as security for two separate loans from separate parties. The contention was then which party had priority in terms of the security.

Hall, V.C. held:

> "I am of the opinion that as between the Plaintiffs [the second creditor] in this action and the Defendant *Tranter* [the first creditor], the Defendant *Tranter* is entitled to priority as to the policy in the *Westminster and General Life Assurance Association*. That policy was deposited with him by way of equitable security. He is first in point of time, and therefore first as regards his security."[113]

The first creditor then contended that he obtained priority by giving notice to the insurance office of his claim first in accordance with the *Policies of Assurance Act 1867*. However, Hall V.C. held on this point that :

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[111] (1885) 28 Ch.D 674, at pages 680 and 681.

[112] (1878) 9 Ch.D 137.

[113] *Ibid* 140.

> "In order to bring the case within the statute, there must, according to the plain words of the statute and the explanatory form of assignment given in the schedule, be an assignment, and an agreement to assign upon request is not an assignment."[11]

Tan Lee Meng writes:

> "In essence, whether there has been a valid assignment under the provisions of the Policies of Assurance Act or section 4(6) of the Civil Law Act, all claims to priority amongst the assignees and encumbrances of a policy are dealt with on the basis that all claimants are equitable assignees so long as the proceeds of a policy are with the insurers or have been paid into court. The priority of equitable assignment is dependent on the date of assignment and the fact that there has been notice of prior equities does not affect the position. However, if X is an equitable assignee for value and Y is the holder of a prior equity, X can claim priority over Y if he has no actual or constructive notice of the earlier assignment and if he has given formal notice to the insurers of the assignment before the insurers have come to know of Y's interest or if X has been misled by Y into taking the assignment or if Y has by his negligence contributed to the creation of the assignment to X."[115]

Robert M. Merkin writes with regard to priorities of assignments:

> "... a number of basic principles may be stated. First, the general equitable rule is that assignments rank in priority in order of their date of creation, but this is subject to the further rule that, where one or more assignees have given notice to the insurer, priority is determined by the date of notice. Secondly, the giving of notice to the insurer will obtain priority only for an assignee, whether legal or equitable, who was unaware of earlier assignments at the date of his own assignment. Knowledge for these purposes may be actual or constructive; the fact, for example, that the assured cannot deposit

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[114] *Ibid* 141.

[115] Tan Lee Meng, *Insurance Law in Singapore*, Second Edition, Butterworths Asia, 1997, at page 417.

> the policy with the assignee has been held[116] to put him on notice that it may have been deposited by way of assignment earlier. ... Thirdly, it is possible to have a legal assignment only by the giving of notice to the insurer."[117]

S. Santhana Dass points out that :

> "This common law position has been altered by *Section 168(2)* of the *Insurance Act 1996* ... Notice of assignment to the insurers are no more relevant for the purpose of determining priority which puts the insurer in a more difficult position. Do they have to ensure that there are no prior assignment before paying to an assignee? It would be impractical to impose such a duty on the insurers because they would have no means of getting such information. As long as they pay to the assignee, whose assignment they had notice, they would be free of liability in respect of any claim, provided they have no knowledge of any earlier assignment. It may be prudent for insurers to include in their standard assignment form, a declaration by the insured that he has not created any prior assignment in respect of the policy at the time of execution of the assignment."[118]

Section 168(2) of the Malaysian *Insurance Act 1996*[119] provides :

> "Where more than one person are entitled under the security or the assignment, the respective rights of the persons entitled under the security or the assignment shall be in the order of priority according to the priority of the date on which the security or the assignment was created, both security and assignment being treated as one class for this purpose."

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[116] The authority given in this book, at page D.1.2-04, for this proposition is the case of *Re Weniger's Policy* (1910) 2 Ch.D 291.

[117] Robert M. Merkin, Kluwer's *Insurance Contract Law*, Croner CCH, 2000, at page D.1.2-04.

[118] S. Santhana Dass, *Law of Life Insurance in Malaysia*, Alpha Sigma Sdn Bhd, 2000, at page 284.

[119] Act 553.

7. Summary

7.1 Assignment of Insurance Policies

Francis Tierney and Paul Braithwaite writes:

> "An insurance policy is a contract under which the insured has defined rights and obligations. An assignment of an insurance policy may be defined as follows:
>
> > An assignment of an insurance policy by an insured is the transfer of the rights and obligations of the insured under the policy to another who then becomes the insured in place of the original insured."[120]

Ray Hodgin writes:

> "Assignment of insurance policies has an important role in commercial life. A common example is where a mortgagee requires the mortgagor to effect a life policy to cover the extent of the loan should the mortgagor die before the loan is repaid. The policy is then assigned to the mortgagee[121]."

Roy Hodgin points out the "... desire of the courts to make the policy assignable and therefore as flexible as possible ..."[122] In order to illustrate this point, this author discusses the United States case of *Grigsby v Russell*[123] where a life policy was taken out by someone on his own life. This person paid two premiums and no more as he required the money for medical care. This person assigned the policy

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[120] Francis Tierney & Paul Braithwaite, *A Guide to Effective Insurance*, Second Edition, Butterworths Canada Ltd., 1992, at page 13.

[121] Ray Hodgin, *Insurance Law - Text and Materials*, Cavendish Publishing Limited (United Kingdom), 1998, at page 63.

[122] *Ibid.*

[123] 222 US 149 (1911).

to someone else for value and the assignee continued to pay the premiums. Upon the assignor's death, the question that arose was whether the insurance company should pay the proceeds to the assignor's estate or the assignee. The Supreme Court of the United Stated held that the proceeds should be paid to the assignee. Mr. Justice Holmes in this case commented:

> "Of course, the ground suggested for denying the validity of an assignment for a person having no interest in the life insured is the public policy that refuses to allow insurance to be taken out by such persons in the first place ... the ground for the objection to life insurance without interest in the earlier English cases was not the temptation to murder but the fact that such wagers came to be regarded as a mischievous kind of gaming ... On the other hand, life insurance has become in our days one of the best recognised forms of investment and self-compelled savings. So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property ... To deny the right to sell except to persons having such an interest is to diminish appreciably the value of the contract in the owner's hands."

This indication of the attitude of the American courts as quoted by an English writer is noteworthy. However, in Malaysia, the courts are bound by the beneficiary of a life policy proving that he/she has an insurable interest in the life insured under section 152 of the *Insurance Act 1996.*[124]

Tan Lee Meng writes:

> "For a valid assignment of personal contracts such as contracts of fire insurance and liability insurance, the insurer's consent is required..."[125]

To be valid, an assignment by the insured of a non-life policy must be contemporaneous with an assignment of the subject matter of

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[124] Act 553.

[125] Tan Lee Meng, *Insurance Law in Singapore*, Second Edition, Butterworths Asia, 1997, at page 411.

insurance to the assignee. The insured will not be in a position to assign the policy at a later date as he will no longer have an insurable interest in the property, in respect of which the policy was issued[126]. ...

> An assignor of a life policy, which is a valuable chose in action, may effect a legal assignment of his policy by virtue of the provisions of the Policies of Assurance Act[127], which only concerns the assignment of life policies, or by virtue of the provisions of section 4(6) of the Civil Law Act[128], which concerns the assignment of all choses in action including life policies[129]."

S. Santhana Dass writes:

> "'Choses in action' or 'things in action' are assignable.

Assignment of chose in action take places when the liabilities imposed or the rights acquired under a contract between ***A*** and ***B*** are transferred to ***C*** who is not a party to the original contract.

> The expression 'chose in action' or 'thing in action', in the literal sense, means a thing recoverable by suit or action in law. ...
>
> Rights under a contract of insurance are choses in action." [130]

As such, it would seem that with regard to property and motor insurance, the assignment or sale of the subject matter of the insurance

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[126] *Ibid* 413.

[127] According to footnote 27, at page 413 of this book, prior to the coming into force of the English Policies of Assurance Act 1867, a life policy could only be assigned in equity and not through a legal assignment. The equitable assignee could only sue by

having the assignor of the policy joined as a party to the action.

[128] The equivalent Malaysian provision is section 4(3) of the Civil Law Act 1956 (Act 65).

[129] Tan Lee Meng, *Insurance Law in Singapore*, Second Edition, Butterworths Asia, 1997, at page 413.

[130] S. Santhana Dass, *Law of Life Insurance in Malaysia*, Alpha Sigma Sdn Bhd, 2000, at page 274.

is insufficient to transfer the insurance policy as well. The insurance company's consent is required before the policy will change hands. In order for the insured or original policy holder to effect a valid assignment, the insurance company's consent and resulting assignment of the insurance policy must be contemporaneous with the assignment or sale of the subject matter since once the assignment or sale of the subject matter is complete, the insured no longer has any insurable interest in the subject matter of the insurance and as such, no more insurable interest in the policy to assign.

Nik Ramlah Mahmood explains:

> "The contract of insurance itself can only be assigned with the consent of the insurer. This amounts to the substitution of a new contract for the old - a novation - and is allowed under the Contracts Act 1950[131]. Novation results in the formation of a new contract between the insurer and the assignee and the latter is subject to all the terms and conditions of the new contract and he effectively replaces the assignor as the insured under the policy."[132]

The assignment of life insurance policies may be effected by the insured through a legal assignment, either under the *Policies of Assurance Act 1867*[133] or section 4(3) of the *Civil Law Act 1956*.

7.2 Assignment of the Proceeds of Insurance Policies

Tan Lee Meng writes:

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[131] Nik Ramlah Mahmood, at page 209, in footnote number 12 clarifies that she is referring to section 63 of the Contracts Act 1950 (Act 136) in this context which states, "If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

[132] Nik Ramlah Mahmood, *Insurance Law in Malaysia*, Butterworths, 1992, at page 209.

[133] If that applies in Malaysia as discussed by Nik Ramlah Mahmood, *Insurance Law in Malaysia*, Butterworths, 1992, at pages 207-208.

> "The proceeds of a policy may be assigned either in equity or at law in accordance with the provisions of section 4(6) of the Civil Law Act[134]. The insured's right to the proceeds of a policy is a valuable chose in action and it may be assigned either before or after the occurrence of a loss. For an assignment of the proceeds of a policy, which is distinct from an assignment of the contract or policy of insurance, the consent of the insurer is not required."

In the case of an equitable assignment of the proceeds of the policy, an action to recover the said proceeds must be brought in the name of the insured.

Where the assignor has effected a legal assignment of the proceeds of the policy in accordance with the requirements of section 4(6) of the Civil Law Act, the assignee may sue in his own name. The assignment must be an absolute assignment in writing under the assignor's hand and express notice of such assignment must be given in writing to the insurers.

The assignee of the proceeds of the policy cannot acquire rights which are superior to those of the assignor. It follows that all the defences which could have been raised by the insurer against the assignor are equally applicable against the assignee. Thus, the insurers may avoid liability on account of the assignor's misrepresentation or non-disclosure. Furthermore, all terms which are conditions precedent to the insurer's liability must be complied with and the insurer may avoid liability to the assignee of the proceeds of a policy on the ground of the assignor's failure to comply with a condition precedent. For instance, in *Re Carr & Sun Fire Insurance Co.*,[135] the insured's failure to provide the insurer with proof of loss within the time stipulated under the terms of the policy precluded the trustee in bankruptcy from recovering the proceeds of the policy."[136]

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[134] The equivalent Malaysian provision is section 4(3) of the Civil Law Act 1956 (Act 65).

[135] (1897) 13 TLR 186.

[136] Tan Lee Meng, *Insurance Law in Singapore*, Second Edition, Butterworths Asia, 1997, at pages 410-411.

7.3 Assignment of the Subject Matter of Insurance Policies

E. R. Hardy Ivamy writes:

> "Before the assignee of the subject-matter can in his own name enforce the contract contained in the policy, it is necessary that the policy should be validly assigned to him...[137]

On the completion of the assignment, the rights and duties of the original assured devolve on the assignee, who becomes, to all intents and purposes, the assured under the policy which he may accordingly enforce in his own name[138]."

Tan Lee Meng writes:

> "The question of an assignment of the subject matter of insurance arises when the insured property has been sold or otherwise disposed of by the insured. It does not arise in the case of life and personal accident policies because the subject matter of such policies is unassignable.
>
> An insured who has voluntarily and completely given up his interest in the subject matter of the insurance ceases to have an insurable interest in the insured property. Such an insured can no longer make a claim under the policy with respect to the property which has been given up as he will not be in a position to suffer any loss with regard to the property."[139]

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[137] E. R. Hardy Ivamy, *General Principles of Insurance Law*, Sixth Edition, Butterworths (London), 1993, at page 348.

[138] *Ibid* 353.

[139] Tan Lee Meng, *Insurance Law in Singapore*, Second Edition, Butterworths Asia, 1997, at page 407.

7.4 Assignment by Operation of Law

The case of *Thomas v. National Farmer's Union Mutual Insurance Society Ltd.*[140] involved the property in hay and straw on a farm being passed from a tenant to a landlord by virtue of the *Agricultural Holdings Act 1948* when the landlord served a notice to quit on his tenant. Diplock J. in this case explained:

> "Where property passes automatically as the result of statutory provisions when certain circumstances arise, it seems to me that this is a passing of property by operation of law."[141]

Tan Lee Meng writes:

> "The insured's interest in the policy or in the subject matter of interest may be assigned by operation of law. For instance, such an assignment will occur in the event of the death or bankruptcy of the insured.
>
> As far as the insured's interest in the insured property is concerned, such interest vests in the insured's personal representative in the event of the insured's death. On the other hand, in the event of the bankruptcy of the insured, the insured's interest in the insured property vests in the Official Assignee. In either of these situations, the continued effectiveness of the policy is not in doubt.
>
> Where a loss occurs before an assignment by operation of law, the insured's personal representatives or trustee in bankruptcy, as the case may be, has the right to claim against the insurers. The position is more complicated where a loss occurs after an assignment by operation of law and after the property has been distributed to those who are entitled to the same. Most policies avoid such complications by providing that the insurer shall indemnify the insured and all other persons to whom his interest in the insured property may pass by means of a will or by operation of law."[142]

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[140][1961] 1 WLR 386.

[141][1961] 1 WLR 386, at page 392.

[142]Tan Lee Meng, *Inssurance Law in Singapore*, Second Edition, Butterworths Asia, 1997, at pages 430-431.

Myint Soe writes :

> "The general principle is that on death and bankruptcy, both the subject matter insured and the policy itself pass to the personal representatives or the Official Assignee, as the case may be.
>
> However, the personal representatives or the Official Assignee cannot have a better title than the deceased or the bankrupt. The claim would be liable to be defeated by any non-disclosure or misrepresentation or breach of condition on the part of the insured before the assignment takes effect."[143]

7.5 Conditions Prohibiting Assignment

Myint Soe writes :

> "Any person who takes an insurance policy should find out whether there is any special clause prohibiting or restricting assignment. Some policies may prohibit the assignment of the subject matter during the currency of the policy. Some policies may prohibit assignment otherwise than by will or operation of law."[144]

Kenneth Sutton writes :

> "A policy of insurance is or evidences a contract and is therefore, like any other agreement, subject to the general law of contract as developed by the common law and modified by statute. In addition, special rules have been developed in relation to insurance contracts. Thus, they are the most common example of that special class of contract known as contracts uberrimae fidei, that is, of utmost good faith, and hence there are special rules in relation to non-disclosure, misrepresentation and the like in respect of them."[145]

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[143] Myint Soe, *The Insurance Law of Malaysia*, Quins Pte. Ltd., 1979, at page 62.

[144] *Ibid.*

[145] Kenneth Sutton, *Insurance Law in Australia*, Third Edition, LBC Information Services, 1999, at pages 11-12.

8. Conclusion

The legal standing of assignments in the field of insurance, thus, is not a straightforward question to answer. It depends on what is being assigned and how assignments are conducted in the various branches of insurance law.

In practical terms, insurance companies themselves may not be certain of the legal stand of various claimants who clamour at their doors demanding payment on insurance claims arising out of purported assignments. Insurance companies, therefore, may demand these eager voices to prove the validity of their claims in court. The insurance company then, will make payment on the claims as directed by the superior wisdom and authority of the court of law. As Irwin M. Taylor writes:

> "Insurance companies are frequently presented with conflicting claims advanced by the original beneficiary and a subsequently designated beneficiary or assignee. Rather than pay to either one at its peril, it is the practice of insurance companies to bring both claimants into a law suit, deposit the money into court and leave the two claimants to fight the matter out themselves."[146]

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[146] Irwin M. Taylor, *The Law of Insurance*, Second Edition, Oceana Publications Inc. (New York), 1968, at page 33.

Backwards And Forwards

1. Introduction

One day in the nineteen-fifties I was seated at a long table in the Chief Secretary's Office in the old Secretariat, Kuching – now, I believe, the Chief Judge's Chambers. The Governor was presiding over the weekly meeting of the Supreme council, and I was attending as acting Attorney General.

The item before the Council was one relating to land: I've forgotten the exact issue. It was the practice of the Governor to invite the views of members of the council in accordance with their seniority, and as the youngest member my opinion was invited first. [The practice is a wise one, since no elder faces contradiction by his junior]

"Would it not be better," I said, "first to ascertain what the local adat may be?" I had read my papers carefully.

"Why?" Enquired the Governor, abruptly.

The question confounded me, and for a moment I was at a loss for words. "Well," I responded lamely, "it may well be that the *adat* already serves the interests of government."

"But we are the government, and the paper before us represents its policy." Such, more or less in those words, was the comment of the Governor: a comment that surprised me. It represented the unconscious arrogance of power.

Let me now move on to 1957, just after *merdeka*. I had been responsible for the drafting of some Bill or other, and was having a discussion with the Minister upon the final draft. The draft approved, I then said (this being in accordance with pre- practice) that the draft Bill would then be circulated to interested bodies: the Bar, trade and commerce. "But why," enquired the Minister, surprised. "Well," I replied, they are most immediately concerned, and their comments will be useful. It is the usual practice." "Certainly not," said the Minister,