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Note and Comment

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NOTE AND COMMENT

INJURIES ARISING "OUT OF" AN EMPLOYMENT.—An employee's duties take him into the streets where he is injured by being run into by an automobile or other vehicle; has he ground for recovery of compensation under the usual WORKMEN'S COMPENSATION ACT providing for an award for injuries "arising out of and in the course of his employment"? Since he was in the street in pursuance of his duties and not in going to or from work, it is clear that the injury was one arising in the "course of" the employment. But did it arise *"out of"* the employment?

The English Courts had made this last question turn largely upon the degree to which the employee was exposed to the risks of the streets. Thus in *Pierce* v. *Provident Clothing and Supply Co.* [1911] 1 K. B. 997, where the claimant was awarded compensation, the Master of the Rolls said: "This work of course necessarily involved spending a great part of the day in the streets in this triangular area; and in the course of his duties he was beyond all doubt much more exposed to the risks of the streets than ordinary members of the public". And in *Sheldon* v. *Needham,* 111 L. T. 729, 7 B. W. C. C. 471, where the claimant, a domestic servant, was injured by slipping on a banana skin in the street while going to a mail box for the employer, the court held there should be no award, on the ground that the injury was due

to a risk no greater than is run by all members of the public. So also in *Slade* v. *Taylor*, 8 B. W. C. C. 65. The Scotch Courts, on the other hand, have not approved the degree of risk test. *M'Neice* v. *Singer Sewing Machine Co.*, 1911 S. C. 12; *Hughes* v. *Bett*, 1915 S. C. 150; *White* v. *Avery*, 1916 S. C. 209. In the last cited case the Lord President said: "It is common ground that the accident arose in the course of the appellant's employment. The question for our decision is whether it arose out of his employment. Now, the learned arbitrator came to the conclusion that it did not, because the risk which the appellant ran in walking upon the slippery road was not a risk to which he was exposed by the nature of his occupation, but was simply an ordinary risk to which every pedestrian was exposed. In my view that is an unsound statement of the law, for the risk on that road at that particular time appears to me to have been a risk incidental to the man's employment. And it was none the less a risk incidental to the man's employment because every pedestrian on that road at that time would have [been] required to face it, or because the appellant was facing it for the first and, it may be, the only time."

The point for English law has been set at rest by the House of Lords in *Dennis* v. *A. J. White & Co.*, [1917] A. C. 479, reversing the Court of Appeal. The claimant on his master's business had been hurt while on his bicycle in the street by a collision with a tram-car. The conclusion of the Scotch cases is approved, while the English cases above cited are expressly disapproved. The conclusion of the House of Lords would seem to be entirely proper and desirable, the English cases having adopted an unnecessarily narrow and technical meaning of the terms of the COMPENSATION ACT.

But suppose the employee is struck by lightning, or is injured by the explosion of a bomb dropped by a raiding aeroplane or Zeppelin? Perhaps but for his employment the claimant would not have been in the zone of danger. That, however, in the opinion of the learned lords is immaterial, unless the duties of his employment placed him in a position of exposure to such harms not shared by the public universally. There must still be some thread of causal connection between the employment and the injury. Working upon a steeple or high scaffold exposes one to peculiar perils from lightning, and perhaps service in a brightly illuminated building or in a munitions plant involves unusual dangers from hostile aircraft. An American employee whose duties take him to England where he is injured by such bomb would seem to receive an injury arising "out of" his employment. See *Foley* v. *Home Rubber Co.*, 89 N. J. L. 474, 15 MICH. L. REV. 606, where an award for death on the Lusitania was allowed. If it is concluded that the duties of the employment did expose the claimant to the danger, then it is wholly immaterial that others under like conditions but not under employment ran precisely the same hazard. So in the case of an employee engaged in running the engine of a threshing outfit injured by the sting of a poisonous wasp the inquiry should be as to whether the duties of such employee exposed him to such perils, not as to the degree of his risk. If an injury on the street arises "out of" one's employment because the injured party's duties took him into the street, and not because of the degree of risk run there, it would seem that the

sting of the wasp was an injury arising "out of" the employment, for it was the duty of the employee that took him out into the open where he was exposed to such perils. But see *Amys* v. *Barton,* [1912] 1 K. B. 40, where it was held that death as a result of the sting of a wasp under the circumstances suggested was not an accident arising "out of" the employment.

In *McNichol's Case,* 215 Mass. 497, the court considered the question under consideration and laid down certain tests as follows: "It (the injury) 'arises out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." Here is a clear recognition of the necessity for the causal connection. The statement has been frequently cited and quoted approvingly. *Hopkins* v. *Michigan Sugar Co.,* 184 Mich. 87; *In re Sanderson's Case,* 224 Mass. 558; *Ohio Building Safety Vault Co.* v. *Industrial Board,* 277 Ill. 96; *Hulley* v. *Moosbrugger,* 88 N. J. L. 161; *Mann* v. *Glastonbury Knitting Co.,* 90 Conn. 116; *State* v. *District Court* (Minn. 1917) 164 N. W. 1012. Quite generally the courts make the case turn upon the presence or absence of "special" or "extra" hazard beyond what other people in the same situation, aside from the employment, are exposed to, which apparently is the very consideration repudiated by the House of Lords. In *Mahowald* v. *Thompson-Starrett Co.,* 134 Minn. 113, where a teamster injured on the street was allowed compensation, the court said: "If his employment as a teamster upon the streets of a large city, where he not only had to look out for his own safety but also for that of his employer's team and rig, *necessarily accentuated the street risks to him above those to other occasional travelers* (italics ours), it suffices for the conclusion that this accident arose out of his employment". And in *Hopkins* v. *Michigan Sugar Co., supra,* where the decision perhaps could have gone on the ground that the employee when hurt was not in the "course of" his employment, the court denied an award because he had not been exposed to any more risk on the street than any other traveler. In *Beaudry* v. *Watkins,* 191 Mich. 445, however, the court allowed compensation for the death of a boy injured while on a bicycle in the street, without any mention of the extra hazard to which his employment exposed him.

R. W. A.

PERFORMANCE OF AN EXISTING OBLIGATION AS CONSIDERATION FOR A PROMISE.—The dictum that if there be nothing in a rule flatly contradictory to reason the law will presume it to be well founded, and that the office of the judge is *"jus dicere* and not *jus dare"*, is responsible for much agony of construction and tortious logic on the part of courts torn by desire to evade it in the interest of modern ideas of right. There is a trilogy of accepted legal principles which it has been particularly difficult for the courts to adhere to in spirit or to repudiate in letter. They are the propositions, that for a promise to be enforcible a consideration must emanate from the promisee, that doing what one is already legally bound to do is not a consideration, and that one is legally bound to perform a contract according to its terms. In other words, doing what one has already contracted to do is not consideration for a promise made on condition or in contemplation of such performance. Under this rule, if A. has contracted to do something for B., his actual performance of that promise can not be consideration for a new promise by B. or a collateral promise by C. There is no lack of real application of the rule. *Stilk* v. *Myrich,* 2 Camp. 317; *Frazer* v. *Hatton,* 2 C. B. N. S. 512; *Harris* v. *Carter,* 3 E. & B. 559; *Bartlett* v. *Wyman,* 14 Johns. (N. Y.) 260; *Seybolt* v. *N. Y., L. E. etc. R. R.,* 95 N. Y. 562; *Village of Seneca Falls* v. *Botsch,* 149 N. Y. Supp. 320; *Ayers* v. *Chicago etc. R. R. Co.,* 52 Iowa 478; *Conover* v. *Stillwell,* 34 N. J. L. 54; *Reynolds* v. *Nugent,* 25 Ind. 328; *Vance* v. *Ellison,* 76 W. Va. 592; *Muir* v. *Morris,* 80 Ore. 378; *Vanderbilt* v. *Schreyer,* 91 N. Y. 392; *McDevit* v. *Stokes,* 174 Ky. 515.

But while courts feel constrained to follow the rule, they have not been hesitant in condemning it as unsuited to modern ideas. They "have rarely failed, upon any recurrence of the question, to criticise and condemn its reasonableness, justice, fairness or honesty". *Jaffray* v. *Davis,* 124 N. Y. 164. So also Mr. Ames, 12 HARV. L. REV. 515, 521; *Foakes* v. *Beer,* 9 App. Cas. 605; *Harper* v. *Graham,* 20 Oh. 106. One court, at least, "profoundly and painfully impressed with the slavish adherence of the legal and judicial mind to precedent, or, in many cases, to what seems to be precedent only", flatly denied, so far as payment of money is concerned, that doing what one is legally bound to do is not consideration. *Clayton* v. *Clark,* 74 Miss. 499. Mr. Justice Holmes, in revolt against imitation of the past as the basis of modern law, evades the rule, unofficially, by denying that one is legally bound to perform a contract according to its terms. 10 HARV. L. REV. 457, 462; THE COMMON LAW, pp. 300 ff. The court in *Frye* v. *Hubbell,* 74 N. H. 358, takes the same view officially.

These, however, are unusual instances. Other courts, while they evince willingness to escape application of the rule, recognize its existence and binding force, and evade it only when they can do so on some plausible distinction or more or less specious assumption. Thus, a number of cases hold the making of the new promise to be sufficient evidence of mutual rescission of the first contract. On this assumption, the original contractor is no longer bound by that agreement and his doing what he had originally promised, or promising a second time to do it, is of course a consideration for the contractee's new promise. *Stewart* v. *Keteltas,* 36 N. Y. 388; *Linz* v. *Schuck,*

106 Md. 220; *Agel* v. *Patch Mfg. Co.*, 77 Vt. 13; *Thomas* v. *Barnes*, 156 Mass. 581. Sometimes, without denying that a contractor is legally bound to perform according to the terms of the contract, courts, paradoxically, hold that his actual performance instead of mere payment of damages for non-performance is a consideration for the new promise. *Lattimore* v. *Harsen*, 14 Johns. (N. Y.) 330; *Goebel* v. *Linn*, 47 Mich. 489; *Bishop* v. *Busse*, 69 Ill. 403. Other courts say that performing according to existing contract instead of exercising an opprtunity to go into bankruptcy is consideration for the new promise. *Melroy* v. *Kemmerer*, 218 Pa. 381; *Engbretson* v. *Seiberling*, 122 Iowa 522. But on the whole, American courts adhere to the principles established. Even the courts which evade their application make assumption, as pointed out, that the prior obligation has been rescinded, or otherwise escape from taking the position that there is no legal obligation to perform a contract according to its terms.

The extra cog in the wheels of logic by which consideration is explained is the case of *Shadwell* v. *Shadwell*, 30 L. J. C. P. 145, and the English doctrine based upon it. In that case the performance by one person of what he was already under contract to do, was held to be consideration for a third person's promise to him. Every writer who has not ignored this case has taken his turn at condemning, harmonising or explaining the decision according to his own ideas. No one has succeeded in making it harmonise with both principles, that doing what one is already legally bound to do is not consideration, and that one is legally bound to perform a contract according to its terms. But this is an English case and the trilogy of principles was saved in this country by the fact, to quote Mr. Williston, that "the almost uniform current of authority in this country is that neither performance nor promise of performance of what one is already bound to do by contract with a third person, is a sufficient consideration to support a promise."

The Court of Appeals of New York, however, has just dammed this current of authority by its decision in the case of *Cicco* v. *Schweizer*, handed down November 13, 1917, Daily Record (Syracuse) Dec. 10, 1917. It appears from the case, that in 1902 one Count Oberto Gulinelli was engaged to marry Schweizer's daughter. Four days before the marriage was to take place Schweizer promised in writing to pay to the daughter the sum of $2,500 annually while both he and she should live. The daughter and her husband assigned this promise to the plaintiff who sued for the installment for the year 1912, which Schweizer had refused to pay. The written agreement reads, "Whereas, Miss Blanche Josephine Schweizer, * * * is now affianced to and is to be married to the above said Count Oberto Giacomo Giovanni Francesco Maria Gulinelli, now, in consideration of all that is herein set forth the said Mr. Joseph Schweizer promises and expressly agrees by the present contract to pay" the sum named. From statements of the court it appears that the promise was made to the Count only, although, the court says, it was intended for the benefit of the daughter and she might have sued upon it. There is nowhere in the agreement any indication that the engagement between the daughter and her count had been broken or was about to be rescinded, and the court explicitly states that neither of the parties

to the marriage promised the father anything. The court seems to say that the consideration was the fact that the parties to the existing marriage contract did not mutually rescind it. Had the promise run to boh of them the differentiation from *Shadwell* v. *Shadwell* might have been well taken. But it ran to the Count alone. The daughter was not a party to the father's agreement, and that she should refrain from acquiescing in a dissolution of her agreement with the Count was a condition, not a consideration. To hold the act of a third person, to whom no promise has been made, to be a consideration would be entirely out of harmony with the idea of reciprocation between the promise and the consideration, the idea of "exchange" of promises or of a promise for an act that is found in every definition of consideration. There is no authority prior to the principal case for disregarding the necessity of reciprocation. The sole consideration, therefor, was the performance by the Count of the contract of marriage by which he was already bound at the time of the defendant's promise. The court holds that the parties married not because they had agreed to do so, but because the father had promised to give the daughter $2,500 per year if they should do so.

This comes perilously close to giving the doctrine of *Shadwell* v. *Shadwell* American authority, and it does drop an obstruction in the course of our logic. While the decision stands as sound, either the happening of an event extraneous to the promisee's volition may be a consideration, or one is not legally bound to perform an existing contract, or doing what one is already legally bound to do may be consideration for a new promise. Either our established notions of consideration as something within the promisee's volition and emanating from him are upset by the case, or it is fresh authority for the proposition that *any* act of the promisee induced by the promise, and intended to be so induced, is consideration for the promise. 14 MICH. L. REV. 570.

J. B. W.

ACQUIRING JURISDICTION WITHOUT PERSONAL SERVICE, SEIZURE OR AID OF STATUTE.—It is often assumed that courts can acquire jurisdiction only by personal service to give jurisdiction *in personam*, or by a seizure to give jurisdiction *in rem*; but it is not so. The assumption is induced no doubt by the fact that in the ordinary common law actions jurisdiction is acquired in that way. Mr. Justice Field very distinctly pointed out in the case of *Pennoyer* v. *Neff* (1877), 95 U. S. 714, that it was not the fact that the land was not seized that rendered the judgment void. It was the fact that the land was not the *res* in litigation in the prior case that made the judgment void.

Laying aside the common law actions of writ of error, certiorari, and the like, in which superior courts always acquired jurisdiction without any personal service or seizure, as being in their nature rather continuations of prior actions in other courts, than a grasp of fresh jurisdiction; no such explanation can be made to justify the fact that courts of probate and administration have from the earliest history of the common law to the present time taken jurisdiction without either of these supposed requisites. Someone suggests

to the court that a citizen has died and petitions that his estate be administered; whereupon the court immediately takes jurisdiction without any seizure at all, appoints someone to collect dues and guard the assets till a final hearing can be had, and orders notice published to all persons interested to appear and defend. No seizure has ever been supposed essential to confer jurisdiction. If the administrator does in fact take possession of certain assets, no one ever supposed that the court's jurisdiction was confined to the assets so seized.

Courts of equity never supposed that any seizure was necessary in the absence of personal service to give them jurisdiction in suits to quiet title, to foreclose mortgages, and the like; nor was any such seizure ever in fact made. The land being immovable there was no danger of it being spirited away before a decree could be awarded, and seizure would be an idle ceremony. If a levy on the attached property in the statutory actions of attachment at law has been required by the statute, it has been rather with the view to make sure that the property would be on hand to answer the judgment that might thereafter be rendered, than because of any notion that a seizure was necessary to confer jurisdiction.

The statutes of the various states have long sanctioned proceedings *in rem* against property in the hands of persons other than the owner without any seizure of the property or personal notice to the owner, by merely summoning the person in possession as garnishee; and even in case there is no tangible property, but a mere indebtedness by the garnishee, a summons to him to hold the indebtedness and account to the court for it has been declared by statute to give the court jurisdiction to proceed *in rem* against the indebtedness without obtaining any jurisdiction *in personam* against the principal debtor; and the constitutionality of these statutes has been sustained in *Harris* v. *Balk* (1905), 198 U. S. 215, 25 S. Ct. 625, and numerous other cases.

Courts of chancery have generally refused to entertain suits in the nature of creditors' bills until the creditor has reduced his claim to judgment at law and had execution levied or returned *nulla bona,* not because of any supposed jurisdictional impediment to entertainment of such suits without personal service on the debtor or seizure of the property, but because the creditor has no standing in equity till he has exhausted his remedy at law. POMEROY, EQ. JUR., § 1415.

But if the creditor's claim is not legal but merely equitable, for which reason he could maintain no action at law, no reason is apparent why a court of chancery should not take jurisdiction at once to afford him relief though there is no tangible property that can be seized, and the defendant cannot be personally served in the jurisdiction, and no statute expressly empowers the court to act in such cases. The court would seem to possess this jurisdiction by reason of its general jurisdiction to grant relief on the claim involved, or because there is no adequate remedy at law.

In *Murray* v. *Murray* (1896), 115 Cal. 266, 37 L. R. A. 626, 56 Am. St. 95, a woman who had been seduced, later married her seducer, and had been immediately deserted by him, filed a bill for separate maintenance without prayer for divorce, and prayed that property that he had transferred after the

seduction but before the marriage to get it out of her reach be appropriated for that purpose. The husband was not found in the state, did not appear, and the transferee demurred, contending that she was not such a creditor at the time of the transfer as could object to the transfer for fraud, and as a creditor could not maintain a bill before obtaining judgment; but the court sustained her bill, and said that attachment is not the only means by which the court may acquire control of the property of the absentee defendant so as to make it a proceeding *in rem*; Harrison and Temple, JJ., dissenting.

The assumption of such jurisdiction in the recent case of *Kelley* v. *Bausman* (Wash., Oct. 26, 1917), 168 Pac. 181, seems fully justified on both reason and authority, though dissented from by Ellis, C. J., and Holcomb, Main, and Parker, JJ. In this case complainant seeking a decree of separate maintenance against her husband who was not found within the state, made persons holding property belonging to him and corporations in which he held stock, defendants, and prayed for and obtained a preliminary injunction restraining the defendants from parting with the property, and a final decree requiring the defendants to turn the property into the registry of the court for her benefit.

In sustaining a similar decree in a like case appealed from the supreme court of Ohio, Mr. Justice Brandeis said in *Pennington* v. *Fourth National Bank* (1917), 243 U. S. 269, 271, "In ordinary garnishment proceedings the obligation enforced is a debt existing at the commencement of the action, whereas the obligation to pay alimony arises only as a result of the suit. The distinction is in this connection without legal significance. The power of the state to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim. It is the same whether the claim is liquidated or is unliquidated, like a claim for damages in contract or in tort. It is likewise immaterial that the claim is at the commencement of the suit inchoate, to be perfected only by time or the action of the court."

In another case, also for alimony, against a defendant not found within the state, the supreme court of Kansas said in *Wesner* v. *O'Brien* (1896), 56 Kan. 724, "The essential matter is that the defendant shall have legal notice of the proposed appropriation, and this is afforded by the publication notice which warns the defendant that one of the purposes of the proceeding is the sequestration of the land. It refers interested parties to the petition, in which the land is definitely described, and wherein it is asked that the land be set apart as alimony. A formal seizure is no more essential to the jurisdiction of the court in a proceeding of this kind than in an action to quiet title to land, based alone on constructive service."

The supreme court of Iowa has gone so far as to hold in a case of this kind, that a mere prayer for such alimony as the court shall deem equitable, without any prayer for sequestration of the particular property to that purpose, gave the court jurisdiction to award the alimony out of property which the complainant had caused to be attached in the proceeding in a mistaken attempt to adapt the legal action of attachment under the statute to a suit for divorce to which it did not extend, and although the defendant in the di-

vorce proceeding was not served within the state and did not appear; for the reason that the fact that the statute did not warrant attachments in divorce proceedings was an irregularity which could not be availed of collaterally. *Twing* v. *O'Meara* (1882), 59 Iowa 326. See also *Thurston* v. *Thurston* (1894), 58 Minn. 279; *Wood* v. *Price* (1911), 79 N. J. Eq. 1; *Benner* v. *Benner* (1900), 63 Ohio St. 220; *Bailey* v. *Bailey* (1900), 127 N. Car. 474.

J. R. R.

INSURANCE POLICIES AS ASSETS IN BANKRUPTCY.—The Supreme Court of the United States, in the recent case of *Cohen* v. *Samuels*, 38 Sup. Ct. 36, has put an end to a method, approved by some of the lower Federal Courts, whereby a person could create a fund which would be completely under his control but which would nevertheless be protected against any claim on the part of his trustee in bankruptcy. The circumstances in the principal case were as follows: Samuels had taken out ordinary life insurance policies, with the usual provisions as to loan and surrender values, payable to certain of his relatives as beneficiaries, but with a provision reserving to Samuels the right to change the beneficiary without the latter's consent. At the time of Samuels' bankruptcy these surrender values were about $1,200, and if before that time Samuels had wished to realize on such surrender values, all that he need have done was to name himself as beneficiary and thus become entitled to the amount. He became bankrupt, and now insists that the policies do not pass to his trustee in bankruptcy as assets because, not being payable to himself, his estate, or personal representatives, they do not fall within the language of § 70, which defines what property shall pass to the trustee. And his claim was apparently so well fortified by authority that the District Court for the Southern District of New York felt impelled to uphold it, and was supported by the Circuit Court of Appeals for the Second Circuit, where, however, HOUGH, C. J., registered a vigorous dissent.

The difficulty arises from the language of § 70, which provides that the trustee shall be vested with the title of the bankrupt to various classes of property, including "* * * (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors, * * * otherwise the policy shall pass to the trustee as assets; * * *" In the earlier years of the administration of the BANKRUPTCY ACT there was considerable doubt as to the precise effect of this proviso as to life-insurance policies. Some courts took the view that such policies passed to the trustee as property which the bankrupt "could by any

means have transferred" except that he might retain those having a surrender value by paying this value to the trustee; under this view it is clear that the trustee would be entitled to a policy like those under consideration, because it could have been transferred by the bankrupt. Other courts took the view that no policies passed to the trustee except those having a surrender value, and they only to the extent of that value. The latter view was finally adopted by the Supreme Court of the United States in *Burlingham* v. *Crouse,* 228 U. S. 459 and *Everett* v. *Judson,* 228 U. S. 474, though in the earlier case of *Hiscock* v. *Mertens,* 205 U. S. 202, there is some indication that the court at that time inclined toward the former view.

In his opinion in *Burlingham* v. *Crouse,* Mr. Justice DAY used the words: "We think it was the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset * * *" And those words have frequently been construed as a limitation on the interest which the trustee can obtain. In REMINGTON, BANKRUPTCY, § 1002, for instance, the rule is expressed as follows: "The trustee is entitled to the cash surrender value, and only to the cash surrender value that would have been obtainable from the insurance company at the date of the filing of the bankruptcy petition, upon all policies on the bankrupt's life that are not exempt by state law and that are payable to the bankrupt, his estate or personal representative." Practically the same proposition is stated in COLLIER, BANKRUPTCY, (11th Ed.) 1139. Such a limitation, restricting the trustee's right to the cash surrender value payable at the time of the filing of the petition, and to policies payable to the bankrupt, was hardly necessary to the decision of the *Burlingham* case, but, as is seen above, it was adopted as law by text writers (though REMINGTON insisted that the contrary view was preferable) and was followed in most of the subsequently arising cases in which the precise point was presented. In most of these cases the policy was, under state laws, exempt from the claims of creditors, and under § 6 of the BANKRUPTCY ACT would therefore not pass to the trustee in any event. *In re Cohen,* 230 Fed. 733; *Frederick* v. *Insurance Co.,* 235 Fed. 639. But the Circuit Court of Appeals for the Second Circuit, in *In re Arkin,* 231 Fed. 947, 146 C. C. A. 143, decided that such a policy did not pass to the trustee, and the same court came to the same conclusion in the principal case when it was before them, in *In re Samuels,* 237 Fed. 796, 151 C. C. A. 38. In both these cases the court relied on its previous decision in *In re Hammel & Co.,* 221 Fed. 56, 137 C.C.A. 80, but as is clearly pointed out by HOUGH, C. J., in his dissent in 237 Fed. 799, 151 C. C. A. 41, the *Hammel* case dealt with a policy which did not have a surrender value, but only a loan value. In the case of *In re Bonvillain,* 232 Fed. 370, the District Court for the Eastern District of Louisiana held that under the law of Louisiana such a policy would pass to the trustee, but it seems that this case, like the somewhat similar case of *Malone* v. *Cohn,* 230 Fed. 882, 150 C. C. A. 144, is based on a misconception of the effect of § 70 as declared in *Burlingham* v. *Crouse,* and treats the policy as property governed by the general language of the section, and not as a peculiar class of property governed by the proviso.

The Supreme Court of the United States, when confronted by the problem

in the principal case, did not minimize the difficulties raised by the language in *Burlingham* v. *Crouse* which seems to put a strict limitation upon the trustee's rights but cut the Gordian knot by invoking clause (3) of § 70, which vests the trustee in bankruptcy with powers which the bankrupt could have exercised for his own benefit. This way out of the difficulty brings about a desirable result, though it somewhat weakens the theory that the proviso in § 70 is a complete, exclusive, self-contained expression of all the law as to life-insurance policies in bankruptcy. And the court says: "Our conclusions would be the same if we regarded the proviso alone", justifying its conclusion by the obviously undesirable result of a contrary holding in making an insurance policy "a shelter for valuable assets and, it might be, for fraud".

It seems clear that the Circuit Court of Appeals gave an unwarranted effect to the decision in *Burlingham* v. *Crouse,* and that the Supreme Court has in the principal case laid down a much more desirable rule. E. H.