GAVAN DUFFY J. I agree with what has been said by the learned Chief Justice.

POWERS J. I also agree.

RICH J. I concur in the judgment of the Chief Justice.

Question answered in the negative.

Solicitors for the Waterside Workers' Federation of Australia, *Farlow & Barker.*

B. L.

[HIGH COURT OF AUSTRALIA.]

PALMER . . . . . APPELLANT;

AND

THE PUBLIC TRUSTEE . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Bankruptcy—Life assurance policy effected by bankrupt—Protection from creditors—After-acquired property—Life, Fire, and Marine Insurance Act 1902 (*N.S.W.*) (*No.* 49 *of* 1902), *secs.* 4, 5, 7—*Bankruptcy Act* 1898 (*N.S.W.*) (*No.* 25 *of* 1898), *secs.* 3, 10, 52.

Sec. 4 of the *Life, Fire, and Marine Insurance Act* 1902 (N.S.W.) provides that "The property and interest of every person who has effected, or shall hereafter effect, any policy for an insurance *bonâ fide* upon the life of himself . . . , or for any future endowment for himself . . . , and the property and interest of the personal representatives of himself . . . in such policy, or in the moneys payable thereunder or in respect thereof, and in the

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contributions made towards the same, shall be exempt from any law now or hereafter in force relating to insolvency or bankruptcy, or from being seized or levied upon by or under the process of any Court whatever." Sec. 5 provides that "A policy for life insurance or endowment or the contributions made towards the same shall not be protected under the last preceding section until such policy has endured for at least two years, after which period such protection shall be afforded to the extent of two hundred pounds of insurance or endowment, and after an endurance of five years to the extent of five hundred pounds, and after an endurance of seven years to the extent of one thousand pounds, and after an endurance of ten years to the extent of two thousand pounds."

Held, by *Isaacs*, *Gavan Duffy* and *Rich* JJ. (*Griffith* C.J. and *Barton* J. dissenting), that sec. 4 of that Act has no application to a policy of life assurance effected by a bankrupt after his adjudication of bankruptcy, and therefore, that in the case of a policy so effected the whole of the policy moneys payable on the death of the bankrupt while still uncertificated belonged to his official assignee notwithstanding that the policy had endured for more than ten years.

Decision of the Supreme Court of New South Wales (*Street* J.): *Re Rygate*, 16 S.R. (N.S.W.), 129, reversed.

APPEAL from the Supreme Court of New South Wales.

In the Supreme Court of New South Wales, in its bankruptcy jurisdiction, a motion was heard whereby William Harrington Palmer, official assignee of Robert Edward Rygate, deceased, a bankrupt, asked for an order declaring that he, the official assignee, was entitled as against the Public Trustee, who was the administrator of the deceased, to the proceeds of a certain policy effected by the deceased while bankrupt on his own life, and for an order directing the Public Trustee, to whom the proceeds had, by arrangement, been paid, to pay the amount of such proceeds to the official assignee, or in the alternative for an order declaring that the official assignee was entitled as against the Public Trustee to be paid out of the proceeds of the policy the amount of the premiums paid by the deceased in respect of the policy and directing the Public Trustee to pay the amount of such premiums to the official assignee out of such proceeds.

The motion was heard by *Street* J., and was dismissed: *Re Rygate* (1).

(1) 16 S.R. (N.S.W.), 129.

From that decision the official assignee now appealed to the High Court.

The material facts are stated in the judgments hereunder.

Clive Teece, for the appellant. Sec. 4 of the *Life, Fire, and Marine Insurance Act* 1902 does not apply to a policy of life assurance taken out by an uncertificated bankrupt. That section only protects the "property" or "interest" of the bankrupt in a policy, but the bankrupt has no beneficial "property" or "interest" in a policy effected after his bankruptcy. Property which a bankrupt acquires after his bankruptcy he acquires as agent for his official assignee: *Herbert* v. *Sayer* (1); *In re Roberts* (2); *In re Clark*; *Ex parte Beardmore* (3). It is not necessary for the assignee to intervene in order to entitle him to the policy moneys on the death of the bankrupt: *In re Bennett*; *Ex parte Official Receiver* (4); *In re Phillips* (5). A bankrupt is under a duty to the official assignee to pay to him all after-acquired property except such as is necessary for the bankrupt's maintenance, and the bankrupt in this case committed a breach of the bankruptcy law when he made payments in respect of the policy. He is also under a duty to disclose all after-acquired property.

[RICH J. referred to *R.* v. *Michell* (6); *Halsbury's Laws of England*, vol. II., p. 346.]

The policy was an investment made with money which belonged to the assignee, and therefore the investment belonged to the assignee. An investment made by a bankrupt in this way is not *bonâ fide* within the meaning of sec. 4. The provisions of sec. 5 show that sec. 4 was intended to apply not to policies effected after bankruptcy but only to those taken out before bankruptcy. The Legislature must have had in mind some point of time at which the period of two, five, seven and ten years mentioned in sec. 5 ended. The only point of time must be the date of the sequestration. The policy then becomes the property of the official assignee, subject to a charge for the amounts and in the events mentioned in sec. 5.

(1) 5 Q.B., 965.
(2) (1900) 1 Q.B., 122.
(3) (1894) 2 Q.B., 393.
(4) (1907) 1 K.B., 149.
(5) (1914) 2 K.B., 689.
(6) 50 L.J.M.C., 76.

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Jordan, for the respondent. The protection afforded by secs. 4 and 5 extends to a policy taken out after bankruptcy. A bankrupt has an interest in such a policy within the meaning of sec. 4. With regard to after-acquired property a bankrupt has definite rights. As regards third parties he is the owner until intervention by the official assignee, and even as against the assignee he has definite rights of enjoyment and possession until intervention. A bankrupt is not an agent of his official assignee in any real sense, and he has a beneficial interest in after-acquired property: *Fowler* v. *Down* (1). Sec. 52 of the *Bankruptcy Act* 1898 recognizes that a bankrupt may acquire property after bankruptcy. Sec. 4 of the *Life, Fire, and Marine Insurance Act* intends that the assets of a person shall be protected from his creditors notwithstanding his bankruptcy, and it is consistent with that intention that he should be permitted to take out a policy of life assurance. In the case of a policy taken out before bankruptcy the point of time at which the periods mentioned in sec. 5 ends is the date of the sequestration, and in the case of a policy taken out after bankruptcy that point of time is the date of the intervention by the assignee. [He also referred to *Mutual Life Insurance Co. of New York* v. *Pechotsch* (2).]

[RICH J. referred to *Attorney-General for New South Wales* v. *Curator of Intestate Estates* (3).]

Clive Teece, in reply.

Cur. adv. vult.

Aug. 31. The following judgments were read :—

GRIFFITH C.J. The appellant is the official assignee of Dr. Rygate, who was adjudged bankrupt in 1892, and in February 1905 effected a life assurance policy for £500 on his own life with the Mutual Life Insurance Company of New York. He died in 1915, and administration of his estate has been granted to the respondent.

Sec. 4 of the *Life, Fire, and Marine Insurance Act* 1902 (which is, so far as regards life insurance a re-enactment of the *Life Assurance*

(1) 1 Bos. & P., 44, at p. 48. (2) 2 C.L.R., 823.
(3) (1907) A.C., 519, at p. 523.

Encouragement Act of 1862) is as follows:—"The property and interest of every person who has effected, or shall hereafter effect, any policy for an insurance *bonâ fide* upon the life of himself . . ., and the property and interest of the personal representatives of himself . . . in such policy, or in the moneys payable thereunder or in respect thereof, . . . shall be exempt from any law now or hereafter in force relating to . . . bankruptcy, or from being seized or levied upon by or under the process of any Court whatever."

The words of the section are clear and unambiguous. It applies in terms to all policies of the kind specified effected by any person whomsoever. What then is its operation? This question is to be answered by inquiring what operation the bankruptcy law would have upon the policy if it were not exempt from that law. The simple answer is that it would divest the property and interest which at common law the insured would have in the policy from him and vest it in his official assignee. It follows, if any conclusion can follow from clear premises, that the property of a bankrupt in a policy of life insurance is not divested from him but remains in him. And this consequence follows equally whether the policy is effected before or after bankruptcy. In my opinion the reasoning of the four very learned lawyers who constituted the Court of Appeal in the case of *In re Ball* (1) is conclusive to show that until intervention by the official assignee the bankrupt is the absolute owner as against all the world except the assignee of any property acquired by the bankrupt during the continuance of the bankruptcy. The acquisition of property may, in this case, as in any other, be by gift, operation of law or purchase. Whatever property the official assignee acquires in it he takes not directly but indirectly by operation of law. If, therefore, the decision of the case depended solely upon sec. 4 the respondent would be entitled to the policy moneys. No question is raised as to the policy itself being within the Act.

The only answer that can be made to this argument is by denying that the bankrupt acquires any property in a policy effected by him during the bankruptcy, so that in such a case there is nothing

(1) (1899) 2 I.R., 313.

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upon which sec. 4 can operate, the reason suggested being that the bankruptcy law has already stepped in and operated before sec. 4 can operate. Put in its naked form, the argument is this: The enactment that the bankrupt's property in the policy shall be exempt from the bankruptcy law does not apply because that law has already operated upon it. It cannot operate upon it before its existence. I am irresistibly reminded of the old puzzle "One thing is certain" &c.

But the effect of any enactment, however plain on its face, may be controlled by an equally plain context, and it is contended that the apparently plain meaning of sec. 4 is controlled by sec. 5 of the Act, which is as follows:—"A policy for life insurance or endowment . . . shall not be protected under the last preceding section until such policy has endured for at least two years, after which period such protection shall be afforded to the extent of two hundred pounds of insurance or endowment, and after an endurance of five years to the extent of five hundred pounds, and after an endurance of seven years to the extent of one thousand pounds, and after an endurance of ten years to the extent of two thousand pounds."

This section is in substance, as it was in form in the Act of 1862, a proviso to section 4. If there is any apparent inconsistency between the two sections they must, if possible, be so construed as to give effect to both enactments. It is suggested that the effect of sec. 5 is to exclude for all purposes the operation of sec. 4 as to all policies that have not existed for a period of at least two years. In that view, sec. 4 must be read as if, instead of the words "be exempt" were substituted the words "from and after the expiration of two years from the effecting of the policy become exempt." This construction is, of course, directly at variance with the express language of sec. 4, which speaks *de præsenti*, and is in terms unqualified. The result of it would, however, be the same for the period of two years as that of secs. 4 and 5 construed literally.

There is no more dangerous, nor, I fear, more seductive, fallacy than to substitute for the actual language of an enactment some formula which would in some cases lead to the result which one is *à priori* disposed to arrive at, and then to construe the actual

enactment as equivalent to the substituted formula. The mental process seems to be an unconscious application of the mathematical axiom "Things which are equal to the same thing are equal to one another," with the fallacious interpretation of the word "equal," where first used, as "equivalent in result."

If the suggested construction is adopted, it follows that a policy does not come within the provisions of sec. 4 until it has endured for two years, and that the bankrupt's property in it, if any, passes on sequestration to his official assignee by operation of law.

A law may not affect a case for either of two reasons, that it does not include the subject matter or that the conditions of its applicability to the subject matter have not arisen. The distinction is sometimes lost sight of, as in the argument I am now considering.

In deference to the weight of the opinion which accepts this suggestion I will pursue it a little further, and it will be found that it merely postpones the supposed difficulty without solving it.

I will take the case of a policy which has endured for two years and less than five years before bankruptcy. Then, in any view of the Statute, the policy comes within the operation of sec. 4. In whom in that case does the property in the policy and in the moneys payable under it vest? There is no difficulty as to the beneficial interest, but the property must either vest in the bankrupt or in the official assignee, or in both jointly. The third alternative is absurd. Either, therefore, the property still vests wholly in the bankrupt, or vests in the official assignee. Sec. 4 expressly denies it to the latter. The only alternative is that it is still vested in the bankrupt, subject, however, to a trust for the official assignee, as to any surplus above £200 if the policy moneys become payable before the expiration of five years, the amount of the trust fund diminishing as time passes and possibly becoming altogether extinguished. These considerations show that sec. 5 has nothing to do with the vesting of the property in the policy itself, which is governed by sec. 4, but relates only to the extent of the beneficial ownership of the bankrupt in a policy which is always vested in him.

Again, the limitation of the protection given by sec. 5 is "to the extent of" a specified amount, which words can only refer to the amount insured or a part of it. This provision is apt as applied

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to a sum of money assumed to be presently payable; but the idea of the protection of a policy, of which, in all but very rare cases, the surrender value or saleable value is (as it must be for the first two years) nominal, to the extent of £200 as distinct from the protection of the amount payable under it is incongruous, and to my mind nonsensical. Further, the mere use in sec. 5 of the words "protected under" implies that the policy is already affected by sec. 4, but that a limit is to be set to its full operation. The extent of the protection is then defined. The same provision implies that the becoming payable of the policy moneys is the event upon which both the coming into operation of sec. 5 and the extent of its operation are to depend. This is inconsistent with the idea that sec. 4 does not affect the property in the policy from its inception.

If, however, we read both sections together, we get a clear and consistent provision, which is that, while the property in the policy and policy moneys, being exempt as such from the bankruptcy law, is always vested in the policy holder, his right and that of his representatives to retain the policy moneys as against his official assignee are nevertheless subject to a condition subsequent, to the effect that, if a claim is made against the policy moneys by his official assignee within the prescribed periods, then, except to the extent prescribed, the immunity or protection shall either not attach at all or shall attach to a limited extent only.

The grant of such a limited and contingent protection is a very different thing from a proviso that the Act shall not for a time apply to the case. It is true that, as I have pointed out, the effect of both constructions would for two years be the same.

The key to the suggested puzzle, if there is one—I confess I have more difficulty in finding than in solving it—is that the meaning of the word "exempt" as used in sec. 4, which in its ordinary and strict sense means "absolutely excluded," is qualified by sec. 5 so as to mean only a conditional exclusion. Such a use of the word may be unusual and inexact, but that is no reason for refusing to admit it. Even, however, if the suggested argument is accepted it does not help the appellant. For, in that view, the case is analogous in principle to that of a person who is in possession of land without title. He has at first no right as against the true owner, but at the

expiration of the period prescribed by the relevant Statute of Limitations the title of the true owner is extinguished and his title becomes absolute. So here, even assuming (against the words of sec. 4) that the official assignee is the true owner of the policy, yet if he does not assert his title within the times limited by sec. 5 the imperfect and defeasible possessory title of the bankrupt becomes absolute. Similar words might be inaccurately but intelligibly used with regard to the analogous case I have put. A Statute of Limitations might provide that a certain class of persons in actual possession of land should be exempt from the laws relating to the recovery of possession by the true owner, with a proviso that this protection should not operate until after the expiration of a prescribed number of years after entry, and then only to a limited extent. No one would doubt what was meant by such a provision, or that if the true owner waited too long his title would not avail him.

The result is that when the time has arrived for claiming the benefit of sec. 4, that is, when the amount insured becomes payable, whether in the lifetime of the insured person or at his death, the amount which can be retained by him or his personal representatives is limited to the sums mentioned in sec. 5. At that period, and no sooner, sec. 5 comes into effect. As to the surplus, if any, since sec. 4 has no application to it, the operation of the bankruptcy law is not excluded, and the surplus passes to the official assignee. In the present case, therefore, as the amount of the policy moneys is such that the protection of sec. 4 can be claimed for the whole of them no question arises under it.

The same result will be arrived at, though by a different road (which was that followed by the learned Judge from whom this appeal is brought), if sec. 5 is regarded as altogether suspending for two years the operation of sec. 4. For, in that view, a policy effected after bankruptcy is after-acquired property of the bankrupt, and as such becomes subject to the bankruptcy law. According to that law the bankrupt may enjoy after-acquired property and may dispose of it until his official assignee intervenes. In the absence of such intervention, therefore, the bankrupt might, but for the express provisions of sec. 7 to the contrary, assign the policy

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to a purchaser. It is true that this right of enjoyment and disposition does not, by English law, prevail as against the trustee in bankruptcy. But the Act now before us lays down, in the plainest terms, this at least—that after the policy has endured for the prescribed period the official assignee shall not intervene. Whatever perils may threaten the infant policy, when it arrives at the prescribed age it is safe from the bankruptcy law.

In the present case the policy has so endured, and the appellant's right to intervene, if it ever existed, is at an end.

I fear that I have occupied too much time in a demonstration of the obvious, when I might have been content to rest upon the plain meaning of the words of sec. 4, which are not to any relevant extent controlled by sec. 5. I have not thought it necessary to examine the operation of the Act in favour of execution creditors, which gives rise to questions of a different character.

The Judicial Committee has several times of late emphasized the importance of giving effect to the plain language of enactments of the Legislature in accordance with their express provisions instead of construing them according to a supposed intention gathered from extrinsic sources. In this case the Court is invited to enter the forbidden path. I respectfully decline to do so.

In my judgment the appeal should be dismissed.

BARTON J. The protection in question must, in my opinion, be regarded as absolute so far as sec. 4 is concerned. Its provisions are perfectly unambiguous in themselves. Since the "property and interest" of the insured are "exempt," in the terms expressly laid down, from laws relating to bankruptcy or executions, it is plain that in construing sec. 4 no consideration founded on the *Bankruptcy Act* can be admitted as affecting Dr. Rygate's "property and interest." If in the absence of a Bankruptcy Act it would be absolute, as necessarily it would be, then it was in fact absolute. It is sec. 4 which seems to me to deal with the vesting of the property, and sec. 5 must be taken to affect, not that vesting, but only the application of the proceeds of the policy as money in the event of their becoming payable or distributable. To deal with the "property and interest" upon any consideration afforded by the

bankruptcy laws would be to run counter to the provisions of sec. 4; and therefore I think that the property and interest must, in construing that section, be considered as if Dr. Rygate had never become bankrupt, whatever claim sec. 5 might have given to the official assignee in the event of death when the policy had endured for only such a period as might call the restrictions of sec. 5 into operation.

I have no doubt that the terms of the Act are wide enough and precise enough to cover the case of a policy of life insurance acquired by a "person" after the sequestration of his estate just as they cover the case of a policy acquired before that event. There is no reason to suppose that the aim of the Legislature did not extend to the one case just as certainly as it does to the other. Sec. 4 gives the protection, subject to the modifications to be mentioned, just as if the person who acquired the policy had never become bankrupt. To my mind the only question is as to the extent of that protection. On the face of sec. 4 the protection is, as has been said, absolute. But sec. 5, which in the Act of 1902 is in effect, though not in mere form, a proviso (it appears as in form, as well as in effect, a proviso in the Act consolidated, namely 26 Vict. No. 13), modifies the protection in some cases. Not in all, however. It is true that by it the protection of the benefits by sec. 4 is deferred until it has been in existence for two years, and that after that period the protection extends only to £200 of insurance. But we are not at present dealing with either of those two cases. We are dealing with the further portion of the same proviso which enacts that the protection "shall be afforded . . . after an endurance of five years to the extent of five hundred pounds." The policy at present in question was for that amount, and where a policy secures £500 or more, and has endured five years, the words quoted are overriding, and the proviso does not diminish by a tittle the completeness of the protection accorded by sec. 4. The policy is relegated to the unhampered operation of that section—but the protection is iterated in terms.

I might stop at this point, because it seems to me that for a case such as the present the Act is explicit. In such a case the policy is exempt from any bankruptcy law, or from seizure or levy, and being so exempt cannot be touched. It does not appear to be at

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all to the purpose to inquire as to the effect of the proviso during any interval between the acquisition of the policy for £500 or more and the expiration of five years. Whether during the two years it vested in the official assignee and revested in the bankrupt at any later period is beside the present question, because it is to me quite certain that it belonged to Dr. Rygate for good and all after the five years. I speak of the beneficial interest. It is not material to discuss whether or not the official assignee became a trustee for the bankrupt after two years to the extent of £200 or after five years to the extent of the whole £500 assured, because here, if after five years he was a trustee for the bankrupt as to the whole, he could not bring this action, which obviously relates to the beneficial interest, to which he has and had no claim. And if he was not a trustee he was a stranger to this policy and its proceeds. My view is that *quacumque viâ* he has no interest in the policy moneys, which are protected in the hands of the defendant, who is the personal representative of the bankrupt; and therefore the appellant has no right to maintain this action.

It is as well to point out that the protection accorded by 26 Vict. No. 13, sec. 2, and therefore by the later Act, is reinforced by sec. 125 of the *Bankruptcy Act* of 1898, which prescribes that nothing in that Act shall affect the operation or prejudice the provisions of the *Life Assurance Encouragement Act* of 1862 or any Act amending or consolidating the same. The Legislature who passed that section were not dealing with a mere illusory protection.

I am of opinion that the appeal should be dismissed.

ISAACS J. The policy in this case was effected by a person who was then an uncertificated bankrupt and who has since died, and when the official assignee in his bankruptcy intervened and claimed the policy moneys, £500, the policy had endured nearly ten years. The claim of the official assignee is rested on two grounds, which, in view of their importance on the general question of after-acquired property, I shall consider separately.

It seems to me plain to demonstration that if, at the moment when the statutory protection is declared to operate, any "property" or "interest" whatever in the policy or its proceeds then exists in the

person who effected the policy or his personal representatives, that property or interest would, by force of sec. 4 read alone, be completely protected from any operation of the bankruptcy law which would otherwise affect it. And it is scarcely necessary to say that one of the provisions of the bankruptcy law which would otherwise affect it, is that which vests after-acquired property in the official assignee. But it must always be remembered that the Act does not say the policy is to be exempt, but it is the "property and interest" of the bankrupt or his personal representatives in the policy or its proceeds that are protected.

The official assignee now contends, as his first point, that sec. 4, even taken alone, cannot protect such a policy as the present, because, he says, an uncertificated bankrupt can never for a single moment have any "property" of his own; that though he may "acquire" it, he does so at the very instant of acquisition, not in his own right, but as the "agent" or "trustee" of the official assignee. In my opinion that argument is fundamentally unsound. It is urged that such is the effect of the vesting provisions of the *Bankruptcy Act*. But lay aside artificial doctrines as, *e.g.*, reputed ownership, the only "property of the bankrupt" that vests or can vest in anyone else is that which the bankrupt has acquired in his own right. "After-acquired property" is nothing more or less than property which the bankrupt acquires as an ordinary member of society, and apart from the *Bankruptcy Act*. The *Bankruptcy Act* declares rights and duties, but does not declare the bankrupt to be either the agent or the trustee of the official assignee to acquire the property. The doctrine of "agency" in the sense now urged is contrary to what was said in *In re Clark* (1). "The relation of principal and agent requires the consensus of both parties" (*Marwick* v. *Hardingham* (2)). The notion of trusteeship in the true sense has never been established, and Lord *Esher* M.R. did not favour it in *Cook* v. *Whellock* (3) even as to holding the property after acquisition.

The statutory direction vesting after-acquired property of the bankrupt in the official assignee *ex necessitate* requires for its operation

(1) (1894) 2 Q.B., 393, see pp. 404, 411.
(2) 15 Ch. D., 339, at p. 349.
(3) 24 Q.B.D., 658, at p. 662.

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the prior acquisition of the property. In *Herbert* v. *Sayer* (1) *Tindal* C.J. observed: "There must be property in the bankrupt, or contracts with him, before such property or contracts can vest in the assignees." The genesis of this provision is found ultimately in the system of equitable assignments of future property. (See *Callender, Sykes & Co.* v. *Colonial Secretary of Lagos* (2).) But, as *Jessel* M.R. said in *Collyer* v. *Isaacs* (3), "a man cannot in equity, any more than at law, assign what has no existence." And even an Act of Parliament which makes a title at law, as well as in equity, in respect of the subject matter dealt with must for that result await the creation of the subject matter itself, which is stated to be "the property of the bankrupt" himself. The cases of *Holroyd* v. *Marshall* (4) and *Tailby* v. *Official Receiver* (5) are founded upon this natural and essential fact.

Consequently, if we had nothing to guide us except sec. 4 we should be compelled to interpret its language as excluding the *Bankruptcy Act* in all cases from the earliest moment it could in the given circumstances operate; in other words, as applying to after-acquired policies as well as to those effected prior to bankruptcy. In that case the decision appealed from would be clearly right. The terms of sec. 4 would have been satisfied, because the bankrupt would have acquired "property," namely, the policy of insurance, and immediately on its acquisition, which would be the earliest moment the *Bankruptcy Act* could operate, but before it did operate, to transfer it to the assignee—for vesting in him is simply a "transfer" (see *per Erle* C.J. in *Morgan* v. *Knight* (6)) or a "divesting" of the bankrupt (see *per* Lord *Esher* M.R. in *Cohen* v. *Mitchell* (7))—sec. 4 of the *Life, Fire, and Marine Insurance Act* would interpose, and exempt that property from such operation.

Then comes the second point relied on, namely, the effect of sec. 5 as limiting the generality of the language of sec. 4 and confining its construction so as to exclude after-acquired property. It was said for the official assignee that the period of two years' endurance meant two years ending with some event, either bankruptcy or

(1) 5 Q.B., 965, at p. 981.
(2) (1891) A.C., 460, at p. 466.
(3) 19 Ch. D., 342, at p. 351.
(4) 10 H.L.C., 191, at p. 211.
(5) 13 App. Cas., 523.
(6) 15 C.B. (N.S.), 669, at p. 677.
(7) 25 Q.B.D., 262, at p. 266.

execution. On the other hand, it was answered that the event might be bankruptcy or intervention or execution, as the case might be. It was also said for the respondent that whatever happened, once the period of two years was reached, the policy or its proceeds would be protected according to the strict language of the Act. In this case intervention would be the essential event in the view presented. Again I draw attention to the language of the Act, for it is the language of the Act itself read as a whole which must govern. Sec. 5 makes it perfectly plain to me that whatever interpretation could be placed upon sec. 4 standing as a detached and solitary enactment, yet, except sec. 5 is complied with, the protection contemplated by the Legislature in sec. 4 is not to be given at all—that is, there is to be no exemption whatever either from bankruptcy law or execution law. If exemption exists at all, it is instantly operative, and never dormant; it is absolute, and not conditional. The only protection is the exemption itself. If the exemption could be supposed to exist but to be dormant, it would enable an official assignee to dispose of an after-acquired policy of £200 or £500 or £2,000 for value immediately it was effected, but the Act would compel the transferee to hand it over to the bankrupt when it was two or five or ten years old, as the case might be. In my view no exemption, or, in other words, no protection, is given unless it can be given in conformity with both sec. 4 and sec. 5. Apart from the application of these and other sections of the Act, the rights to the policy and its proceeds, both in regard to vesting of policy and otherwise, are governed by the bankruptcy law. Now, sec. 5 fixes the earliest moment of protection at two years after the creation of the policy; and sec. 4 requires the protection to be given in respect only of the "property and interest" of the person effecting the insurance or his personal representatives. Is it possible, taking the whole enactment into consideration and reading each section by the aid of the other, so as to be consistent, to say that sec. 4 does include after-acquired policies?

The problem of reconciling sec. 4 with sec. 5 resolves itself into this question: What interest has an uncertificated bankrupt in a policy of insurance which has endured two years? The policy is certainly "property" within the meaning of sec. 3 of the *Bankruptcy*

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Act because it is a "thing in action" (*Ex parte Ibbetson* (1)). The *Life, Fire, and Marine Insurance Act* does not, in my opinion, contemplate the policy holder's death as an essential condition before protecting the policy. This is shown both by the fact that, as already stated, the policy itself is "property" from the beginning, and also by the circumstance that sec. 4 of the *Life, Fire, and Marine Insurance Act* protects the property of the person effecting the policy, that is, during his lifetime, and also as a separate consideration the property of his personal representatives, which must be after his death. Now, the interest which an undischarged bankrupt has in his after-acquired property is nowhere definitely stated. The law has to be gathered rather from a series of examples and subsidiary rules formulated in decisions than in any express authoritative standard laid down, and the bankrupt's position with respect to his after-acquired property is not referable to any specific classification. He is not strictly a trustee or an agent. He has rights and duties and powers and obligations which are peculiar to his special status, and to a large extent they have, where unexpressed in the Statute, been evolved from the necessity of the case. As to presently acquired property existing at the moment of bankruptcy, the position is clear enough, and the contrast it affords may help. That class of property is by force of the Statute at once transferred absolutely and completely to the official assignee. No dealings with it by the bankrupt can alter the rights of ownership (*Ex parte Cooper* (2); *Ex parte Rabbidge* (3)). It all passes absolutely except that which the Statute expressly exempts.

But though future acquired property also "vests," the literal words of the Statute are qualified by exemptions and reservations read into them by a long course of decisions and practice which evolved side by side with the line of enactments, and which may, in the language of *Grose* J. in *Kitchen* v. *Bartsch* (4), be termed "landmarks" of the law of bankruptcy.

I have already indicated that future property is in the first instance *acquired* by the bankrupt as his own. The question which we have

(1) 8 Ch. D., 519.
(2) 39 L.T., 260.
(3) 8 Ch. D., 367, at p. 370.
(4) 7 East, 53, at p. 63.

now to determine is: How does he *hold* it immediately on its acquisition? Putting aside the question of real estate considered strictly as such, and certain recognized exemptions of personal property such as reparation of personal wrong, and the means necessary for the support of the bankrupt and his family (these exceptions proving that for a notional though not measurable period the bankrupt does acquire property as his own and not as the slave of the official assignee), the decided cases, notwithstanding their diverse language and sometimes embarrassing expressions, establish that, as between bankrupt and assignee, the bankrupt's personal property acquired after bankruptcy and before discharge vests at once in the assignee. In any controversy between the two, the assignee's title is clear. The statutory assignment, substituting for the equitable effect of an assignment *inter partes* of future property the whole legal and equitable right, subject to the ultimate right of creditors and bankrupt, instantly upon the full acquisition of the property by the bankrupt divests him and transfers it to his official assignee. No intervention is necessary for this purpose. In *Holroyd* v. *Marshall* (1) the point which the House of Lords had to determine was whether a *novus actus interveniens* was needed to complete the title of the mortgagee of future machinery of the mortgagor. The House held (2) that no such act was necessary, and that, in equity, "immediately on the acquisition of the property described" the mortgagor held it in trust for the mortgagee. So in *Tailby* v. *Official Receiver* (3). And this principle has been recently enforced in *In re Lind* (4), where *Swinfen Eady* L.J. said (5) "an assignment for value of future property actually binds the property itself directly it is acquired—automatically on the happening of the event, and without any further act on the part of the assignor." See also *per Bankes* L.J. (6). The Statute, when it divests the bankrupt, passes both legal and equitable rights to the assignee, and the result is that as between the two the assignee is the complete owner of the property and the bankrupt has no fragment of

(1) 10 H.L.C., 191.
(2) 10 H.L.C., at p. 211.
(3) 13 App. Cas., 523.
(4) (1915) 2 Ch., 345.
(5) (1915) 2 Ch., at p. 360.
(6) (1915) 2 Ch., at p. 373.

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ownership in it. The cases which perhaps show this most distinctly are *In re Clark* (1) and *In re Roberts* (2).

No doubt there are many observations to the effect that the bankrupt has a " qualified property " or some kind of interest. But when the cases come to be closely scrutinized, I can see nothing more in the matter than this—the bankrupt having acquired the property, in the first place as his own, and being undisturbed in the possession of it, has a better right to its possession and enjoyment than any third person. Further, there is introduced into the matter the humane and irrepressible consideration that the bankrupt has a right to live and to see that his family live ; his property may justly be taken to pay his debts, but he is not to be reduced to servitude, and therefore he is at liberty to trade or otherwise to acquire property, and in addition to the right of retaining for himself all necessary sustenance, he possesses the incidental power of protecting all that trade and property and enforcing as against the world at large whatever rights he possesses as under the ordinary law. But, being so at liberty, it is necessary to protect those who deal with him, and the doctrine of *Cohen* v. *Mitchell* (3) applies for their protection. Accordingly, any person who deals with the bankrupt for value even with full knowledge of the bankruptcy can, unless and until the assignee intervenes and intercepts the property (*Ex parte Dewhurst* (4)), obtain from or through the bankrupt a good title to the after-acquired property. *In re Behrend's Trust* (5) is a recent instance where this doctrine was applied. But that doctrine does not, as I understand, invest the bankrupt with any " property " or " interest " in himself in the subject matter. His position enables him to transfer more than he has, provided it is in the course of dealing honestly and for value, and no intervention takes place by which the property is intercepted. He is thus enabled to divest the estate of property he brought into it as after-acquired property, but, if he brings in new property in exchange, it falls under the general rule and passes in turn as new property to the assignee subject to the same rules and doctrine of law as affected the former property.

The consequence is that when the two years or five years or

(1) (1894) 2 Q.B., 393.
(2) (1900) 1 Q.B., 122.
(3) 25 Q.B.D., 262.
(4) 7 Ch., 185.
(5) (1911) 1 Ch., 687.

ten years had expired after the policy in this case was effected, the bankrupt had, as against the assignee, no property or interest in it. His property and interest had long since disappeared. And it is all-important to remember that the *Life, Fire, and Marine Insurance Act* is intended to operate only as between the bankrupt and the assignee as representing his creditors. There was, therefore, nothing to protect under sec. 5. And, as sec. 4 is dependent on sec. 5, it follows that the subject matter upon which alone sec. 4 as controlled by sec. 5 could operate did not at the given moment exist. In other words, sec. 4 when read with sec. 5, while perfectly applicable to policies effected before bankruptcy, cannot be construed so as to refer to policies effected afterwards. I would refer to the concluding words of sec. 7 as confirming this view. They exclude assignees of the insured from the benefit of the exemption. But as a bankrupt can always validly assign after-acquired property for value until intervention, the assignee of an after-acquired policy would be protected quite apart from the Act at all.

For these reasons I am of opinion that the appeal should be allowed.

I should add that I regard this as a very hard case, and it is with the greatest reluctance I arrive at my conclusion. It is extremely painful to be forced to so decide, when the facts are that a struggling medical practitioner in poor circumstances by careful economy managed to save £5 8s. 4d. a quarter out of his personal earnings, to provide £500 for five children, the eldest of whom, when the policy was effected, was about 19. But a Judge has no option ; he has only to declare the law. The hardship of such a case is for the consideration of the Legislature, and I commend it to them.

No question was raised as to whether the policy was one within the meaning of the Act.

GAVAN DUFFY and RICH JJ. Dr. Rygate was adjudicated a bankrupt on the 21st July 1902, and remained an uncertificated bankrupt until his death in January 1915. During that period he continued to practise his profession, and in February 1905 he effected a policy of life insurance on his own life for the sum of £500, and

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paid the premiums falling due from time to time out of professional fees subsequently received by him.

The question for our consideration is whether the official assignee is entitled to the moneys secured by the policy. He is so entitled if his claim is not defeated by the provisions of secs. 4 and 5 of the *Life, Fire, and Marine Insurance Act* 1902. In our opinion these sections, and all the sections contained in Part II. of the Act, have reference to policies effected before, and not to those effected after, the sequestration, and are intended to encourage the practice of life insurance by protecting *bonâ fide* investments of this nature against the claims of creditors under subsequent sequestration or executions. The sections of Part II. are collected under the title "Life Insurance Encouragement," and are preceded by the following preamble :— "For the encouragement and protection of life insurances and other like provident arrangements for the benefit of insurers, their wives, and families, be it enacted as follows:—". It is suggested that these words apply to the case of a bankrupt purchasing a policy with money acquired by him, after sequestration, which the *Bankruptcy Act* declares to be divisible among his creditors. One would imagine that what was to be encouraged and protected was the investment of a man's own money, not that of his creditors, and the language used in secs. 4 and 5 seems appropriate for that purpose, and for no other. The relevant portions of the sections are as follows :—"(4). The property and interest of every person who has effected, or shall hereafter effect, any policy for an insurance *bonâ fide* upon the life of himself . . ., or for any future endowment . . . in such policy, or in the moneys payable thereunder or in respect thereof, . . . shall be exempt from any law now or hereafter in force relating to insolvency or bankruptcy, or from being seized or levied upon by or under the process of any Court whatever." "(5). A policy for life insurance or endowment . . . shall not be protected under the last preceding section until such policy has endured for at least two years, after which period such protection shall be afforded to the extent of two hundred pounds of insurance or endowment, and after an endurance of five years to the extent of five hundred pounds, and after an endurance of

seven years to the extent of one thousand pounds, and after an endurance of ten years to the extent of two thousand pounds."

Secs. 4 and 5 are taken substantially from sec. 14 of the *Mutual Provident Society's Act* of 1857, and it can hardly be supposed that the Legislature intended to favour the transactions of that Society by taking from creditors moneys actually divisible among them at the time when such moneys were invested by a bankrupt in the purchase of a policy from the Society. The provisions of the original Act have been applied to insurance companies generally, not only in New South Wales, but throughout the Commonwealth and New Zealand, and it is noticeable that though, as might be expected, the language of the various enactments differs they all seem to protect policies effected before, and not those effected after, sequestration. The general effect of secs. 4 and 5 may be stated thus. They apply only to a property or interest in a policy which has endured for at least two years, and they protect such a property or interest against the effect of accruing bankruptcies and executions. Sec. 4 assumes the existence of a "property" or "interest" not under but independent of the bankruptcy law to which the provisions of the section are to apply; it does not give to the bankrupt or execution debtor anything which he does not possess, but merely protects a "property" or "interest" which he has already obtained, and does so by making it exempt from the bankruptcy law and from executions. To be "exempt" means "to be free or clear of," "to be wholly unaffected by," and therefore the protection of the section must be invoked at the instant when, but for the section, some law relating to bankruptcy or insolvency, or the process of some Court, would affect the existing "property" or "interest." Sec. 5 provides that the protection afforded by sec. 4 shall not commence until the policy has endured for at least two years, in other words, it defines the operation of sec. 4 and limits it so that it shall affect only policies which have been in existence for at least two years. The inquiry, to be made at the instant the protection of the section is invoked, is twofold:—(1) Has the person seeking the benefit of the section then got an existing "property" or "interest" in the policy? (2) Has the policy then endured for at least two years? If either of these questions is answered in the negative, the policy

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is not protected. It is plain that both branches of the inquiry are appropriate in the case of a policy effected before sequestration, and that the answer to each question will be in the affirmative or negative according to the circumstances of the case, but where the policy has been effected after bankruptcy, the answer to either one or other of the questions must always be in the negative. Let us examine the matter a little more closely. It is said that Rygate obtained a "property" or "interest" in the policy of insurance within the meaning of sec. 4 as soon as it was issued to him, and that that "property" or "interest" once acquired could not be affected by the bankruptcy law vesting "after-acquired property" in the official assignee, because sec. 4 in terms protects such "property" or "interest" against the bankrupt law. We agree that if a "property" or "interest" is once acquired independently of the bankruptcy law, it comes within the provisions of sec. 4. But did Rygate acquire any "property" or "interest" in the policy which was issued, or did the provisions of the bankruptcy law, vesting after-acquired property in the official assignee, prevent him from acquiring any such "property" or "interest"? The effect of such vesting provisions has been much debated, and is stated in the judgment of *Bigham* J. in *In re Bennett* (1). After reviewing the cases, his Lordship came to the conclusion that the bankrupt acquires such property as agent for the assignee or trustee in bankruptcy and for his benefit, and continues to hold it in that capacity unless and until he parts with it for value or surrenders it to the assignee or trustee. If this be the effect of secs. 10 and 52 (*c*) of the New South Wales *Bankruptcy Act* 1898, Rygate never obtained any "property" or "interest" in the policy, and so could not avail himself of the provisions of sec. 4, nor could his personal representative do so. But let us assume that on a true construction of the vesting provisions the bankrupt does take a "property" or "interest" in "after-acquired property," either independently of the bankruptcy law, before it passes to the official assignee, or under the bankruptcy law for his own benefit until the assignee intervenes on behalf of creditors. On the first hypothesis Rygate did obtain a property in the policy, not under, but despite,

(1) (1907) 1 K.B., 149.

the bankruptcy law, and it may be conceded that the language of sec. 4, if that section stood alone, would be appropriate to exempt such a property from the operation of the bankruptcy law as soon as it was acquired, and so confirm it permanently and absolutely in the bankrupt. The bankruptcy law, not affecting the property in the policy, could never take it out of the bankrupt and vest it in the official assignee. But sec. 5 provides that the exemption contained in sec. 4 shall operate only on policies which have endured for two years, and immediately after Rygate obtained a property in the policy, that property, wanting the protection of sec. 4, became subject to the bankruptcy law and passed to the official assignee. On the alternative hypothesis Rygate never had any "property" or "interest" in the policy except by virtue of the bankruptcy law under which he took a defeasible property in the policy when it was effected. On neither hypothesis was the bankrupt's property in the policy protected, because in neither case was there or could there have been performance of the condition as to endurance of the policy for two years; and on the second hypothesis the bankrupt never had any absolute property, or indeed any property or interest apart from the bankruptcy law, on which the exemption could operate. It has been suggested that this policy might be protected if the time for invoking protection could be postponed from the date of effecting the policy to the date when it had endured for two years; that on the first hypothesis the property might have passed to the official assignee and remained in him until the policy had endured for two years, or, on the second hypothesis, might have remained in the bankrupt during that period subject to the intervention of the assignee, but that when it had endured for two years, an absolute property to the extent of £200 was restored to the bankrupt, or the defeasible property to that extent was converted into an absolute property, and so on at the termination of each successive period prescribed by sec. 5. Finally it is said that the two sections may be properly construed by postponing the period for invoking their protection until the money secured by the policy becomes due. On this construction the official assignee or execution creditor would apparently be entitled to deal with the policy as if secs. 4 and 5 did not exist, and when the money became due, if someone considered

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it advisable to pay the premiums and it ultimately did become due, the claim of the bankrupt or his personal representatives would supersede all dealings with the policy under the bankruptcy or execution to the extent provided by sec. 5. The answer to these suggestions is to be found in the meaning which we have already attributed to the word " exempt " in sec. 4. A postponement is not consistent with the language of that section, which provides for a total exemption from the bankruptcy law, not for an exemption or a series of exemptions from its further operation accompanied by avoidance of prior partial operation, nor for the creation by fluxion of time of a property in the bankrupt such as he never before had. It cannot be invoked either to restore and protect an absolute property which has been lost by the past operation of the bankruptcy law, or to create an absolute property in a bankrupt who has never had more than a defeasible property.

Appeal allowed. Order appealed from discharged except as to costs. Order as in the first alternative of the notice of motion.

Solicitors for the appellant, *Fisher & Macansh.*

Solicitors for the respondent, *McDonell & Moffitt.*

B. L.