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was quite obvious that he was presenting his good right ear to the speaker whenever he could. As I was on his left I noticed that if I spoke to him normally at a range of some 12 feet he would at once be attracted by the fact that I was speaking, although he would often want something repeated before he really appreciated what the point was. In short, I am quite satisfied that there is a very substantial diminution in hearing in his left ear, although if he is fortunate enough to retain the hearing in his right ear this should not be, perhaps, an undue handicap to him. He has, however, to be compensated for that, he has to be compensated for what I can well understand is the highly disturbing continuous whistling noise from which he suffers and from which, apparently, he will continue to suffer for the rest of his life, and he also must be compensated for the considerable pain and suffering he suffered over a period of approximately eight or nine weeks. The figure which I would award on the basis of full liability would be £1,000, and I shall, therefore, enter judgment for the plaintiff for half of that sum, namely, £500.

Judgment for the plaintiff for £500 with costs.

Solicitors: *O. H. Parsons*; *Herbert Smith & Co.*

[COURT OF APPEAL]

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LORD DENNING M.R., HARMAN and SALMON L.JJ.

POST OFFICE *v.* NORWICH UNION FIRE INSURANCE SOCIETY LTD.

[1965 P. No. 2271]

Insurance—Interest of third party in policy—Act of 1930*—Indemnity for all sums "which insured shall become legally liable to pay" —Damage to third party's property by insured—Liability denied —Insured in liquidation before liability and quantum determined— Whether third party entitled to proceed direct against insurance company—Proper procedure—Whether third party should proceed with leave of court against company in liquidation for determination of liability—Third Parties (Rights against Insurers) Act,* 1930 (20 & 21 *Geo.* 5, *c.* 25), *s.* 1.

Practice—Parties—Insurance—Cause of action against insured company—Indemnity for all sums "legally liable to pay"—Company

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in liquidation—Company's liability and quantum of damages not determined—Whether injured third party may sue Insurers—Whether should apply for leave to sue company in liquidation—Third Parties (Rights against Insurers) Act, 1930, *s.* 1.

In May, 1963, a company of contractors damaged a Post Office cable. The Post Office by letter claimed £839 10s. 3d. for its repair. The contractors denied liability. Before any proceedings had been begun to determine liability and quantum, the contractors, in June, 1964, went into compulsory liquidation. The contractors were insured under a public liability policy in the usual terms, which provided that the insurers "will indemnify the insured against all sums which the insured shall become legally liable to pay . . . in respect of . . . damage to property." Condition 3 of the policy stipulated that "No admission offer promise payment or indemnity shall be made or given by or on behalf of the insured without the written consent of the [insurance] company."

On June 17, 1965, the Post Office issued a writ against the contractors' insurance company, claiming that under section 1 of the Third Parties (Rights against Insurers) Act, 1930,[1] they were entitled, once the contractors had gone into liquidation, to claim against their insurers direct the sum of £839 10s. 3d. The insurance company claimed that until liability and quantum of damage had been determined by agreement or judgment against the insured, the Post Office had no cause of action against the insurers under the policy. Donaldson J. decided that issue in favour of the Post Office. On appeal by the insurance company:—

Held, allowing the appeal, (1) that the rights of the insured against his insurers, which vested in an injured third party by virtue of the Act of 1930, were transferred subject to the conditions in the contract of insurance; and that since the insured contractors could not have claimed to be indemnified by their insurers until their liability had been established, the Post Office could be in no better position, and was therefore not entitled to sue the insurance company direct until the contractors' liability had been determined: a fortiori where liability was disputed.

Hood's Trustees v. *Southern Union General Insurance Co. of Australasia* [1928] 1 Ch. 793, C.A., explained.

[1] Third Parties (Rights against Insurers) Act, 1930, s. 1: "(1) Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then—(*a*) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; or (*b*) in the case of the insured being a company, in the event of a winding-up order being made . . . with respect to the company . . . if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred."

Dictum of Devlin J. in *West Wake Price & Co.* v. *Ching* [1957] 1 W.L.R. 45, 49; [1956] 3 All E.R. 821 approved.

(2) That where liability had not been established before insolvency supervened the correct procedure was for an injured third party to obtain the leave of the court to bring proceedings against the insolvent wrongdoer and when liability and quantum had been determined in those proceedings, the third party could claim that sum from the insurance company by virtue of the Act of 1930.

Decision of Donaldson J. reversed.

INTERLOCUTORY APPEAL from Donaldson J.

On June 17, 1965, the Post Office issued a specially indorsed writ against the Norwich Union Fire Insurance Society Ltd., their statement of claim alleging (1) that at all material times the insurance society insured A. J. G. Potter & Sons Ltd. (" the contractors ") (a company in liquidation) against their legal liabilities to third parties in respect of damage occasioned to third parties by the contractors, their servants or agents; (2) that on or about May 24, 1963, at St. John's Street, Huntingdon, the contractors by their servants or agents damaged a telegraphic line belonging to the Post Office and that the cost of making good the damage was £839 10s. 3d.; (3) that the contractors had not paid that sum or any part of it to the Post Office and that on June 1, 1964, the contractors went into liquidation; and the Post Office claimed from the insurance society pursuant to section 8 of the Telegraph Act, 1878, and section 1 of the Third Parties (Rights against Insurers) Act, 1930, the sum of £839 10s. 3d.

By their defence the insurance company admitted that by a policy of insurance they had at the material time indemnified the contractors against all sums which the insured should become legally liable to pay as compensation in respect of (inter alia) damage to property caused by accidents happening in connection with the business of the insured. They went on to claim that the damage to the cable was caused by a Post Office engineer who on the Post Office instructions had shortly before May 24, 1963 met a representative of the insured contractors at the site of drainage works being carried out by the contractors in St. John's Street for the purpose of pointing out where the Post Office cables lay; that the engineer had negligently or wrongly indicated the wrong siting for the cables; and liability was accordingly denied. The defence went on to state that in any event they would object in point of law (i) that on the true construction of the policy of insurance it was a condition precedent to the liability of the insurance society to

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indemnify the insured that the insured should have become legally liable to pay a sum of money as compensation; (ii) that if the rights of the insured under the policy had by virtue of the Act of 1930 vested in the Post Office, the Post Office had by virtue of that Act no greater rights against the insurance society than the insured contractors would have had; and (iii) that the insured contractors never having become legally liable to pay the alleged or any sum of money as compensation by agreement, judgment or otherwise, the Post Office had no cause of action against the insurance society under the policy.

It was agreed that there should be a trial of the preliminary issue of law, namely, the contention of the Post Office that on the true construction of the Act of 1930 and of the policy of insurance the liability of the insurance society to the Post Office was in the events which had happened established by proof that the insured under the policy became liable to pay unliquidated damages to the Post Office; and also the contention for the insurance society that, on the true construction of the Act and of the policy, and in default of agreement, judgment against the insured was a condition precedent to liability of the insurance society under the policy, and that in the premises, no sum of money having been ascertained, whether by judgment or agreement, to be payable by the insured contractors (as was admitted), the present action must fail. The issue was tried by Donaldson J., who on November 23, 1966, in a reserved judgment, ordered that the question of law be answered in favour of the Post Office.

The insurance society appealed, asking that the judge's order be set aside and judgment entered for them, on the grounds (1) that on the true construction of the policy and the agreed facts the judge erred in law and misdirected himself in holding that the insured contractors had at any material time any right to be indemnified by the insurance society under the policy in respect of the matters complained of by the Post Office; and (2) that on the true construction of the Act of 1930 and the agreed facts the judge erred in law in holding that a right to be indemnified by the insurance society under the policy in respect of the matters complained of by the Post Office had been transferred to or vested in the Post Office by virtue of the Act of 1930.

Hugh Griffiths Q.C. and *Ian Warren* for the insurance society. The preliminary question is whether, where a third party alleges that he has been injured by the fault of a person or company

holding a public liability policy who goes bankrupt or into liquidation before the third party brings any proceedings, the Third Parties (Rights against Insurers) Act, 1930, gives the third party a right of action direct against the insurance society, in which action the issue of liability and quantum of damage may be determined. The insurance companies are anxious that there shall be no right of direct action against them, for it would mean bringing their names before the courts as defendants in many cases where they may have perfectly good defences on the merits.

The Act of 1930 was passed to remedy and has remedied the harsh situation revealed by the decisions in 1928 in *In re Harrington Motor Co. Ltd. Ex parte Chaplin*[2] and *Hood's Trustee* v. *Southern Union General Insurance Co. of Australasia*,[3] where insurance moneys due to the insured tortfeasor under his policy went for the benefit of the general creditors when he became bankrupt, and the injured third party lost the fruits of the insurance. The Act provides that in such a case the injured third party shall stand in the shoes of the bankrupt insured and have all his rights, but no more than those rights.

The policy in question here is a contract of idemnity, the essence of which is that the insured has no right to call on the insurers to indemnify him until he can show that he has suffered a loss: see *per* Devlin J. in *West Wake Price & Co.* v. *Ching*.[4] [Reference was also made to *McCormick* v. *National Motor and Accident Insurance Union Ltd.*[5]; *Freshwater* v. *Western Australian Assurance Co. Ltd.*[6]; Halsbury's Laws of England, 3rd ed., vol. 22 (1958), pp. 180, 181, para. 348; and Shawcross on Motor Insurance, 2nd ed. (1949), p. 129.] When the Post Office issued its writ in this action the company in liquidation had no right to an indemnity against its insurers because its liability to the Post Office had not been established, and the rights transferred to the Post Office by the Act could be no greater than those of the company. The proper course was for the Post Office to bring its action against the contractors in the first place so that liability and quantum could be determined; and if those were established, the Post Office could then proceed against the insurance society.

Another reason for saying that the procedure supported by the judge is not the correct procedure is that if this had not been

[2] [1928] 1 Ch. 105; 44 T.L.R. 58, C.A.
[3] [1928] 1 Ch. 793, C.A.
[4] [1957] 1 W.L.R. 45, 49; [1956] 3 All E.R. 821.
[5] (1934) 50 T.L.R. 528, C.A.
[6] [1933] 1 K.B. 515; 49 T.L.R. 131, C.A.

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damage to a cable but a personal injury (which is also covered by the policy), the action against the tortfeasor would, under the Statutes of Limitations have to be brought within three years of the tort, and if that is not done the tortfeasor can rely on his statutory defence under the Limitation Acts; but if the Post Office contention is correct and the liability and the right to indemnity attach at the moment when the damage occurred, so that the insurance society becomes the defendant, the statutory period of limitation in contract would be six years, and the insurance company would thereby be deprived of a statutory defence.

Sir John Hobson Q.C. and *John Newey* for the Post Office. The point for decision is a narrow matter of procedure and what is most convenient for everyone concerned. If the insurance company is right, the Post Office, which faces about a dozen cases against bankrupt tortfeasors in every year, would in each case have to bring two actions, the first of which would be otiose because it would be against a person who cannot pay. The sensible procedure is to proceed against the insurers who are expected to provide the insurance moneys, by the process of proving the three steps required by the Act of 1930.

In the ordinary case, where no bankruptcy supervenes, the position is that on the happening of any event which gives a cause of action to the injured party, whether in contract or in tort, the injured party at once obtains an enforceable right which is a chose in action, even though both liability and quantum are disputed. That may fructify into a money payment as a result of any one of several different processes: admission, agreement, arbitration, or action. But from the moment when the negligence and damage occur, the person against whom the right exists is under a legal liability.

If that liability is covered by a policy of insurance, the insured has a contractual right, subject to the terms of the policy, which he can enforce against his insurers. That right is also from the moment of negligence and damage a chose in action, the potential benefits of which the insured can assign. It is conceded that where a policy contains a term like condition 3 of this policy, there is the practical difficulty that the insured has to help the insurance society. The insured cannot admit the damage to the third party and his own liability without being in breach of his obligation under the policy. But the right against the insurers is there.

When a bankruptcy or winding-up supervenes, the two rights set out above are united in a single person, the injured third

party, who can both prove his damage and recover it from the insurance society, for he is freed from the obligation of having to fight the insurance society's battle. That right against the insurance company is a right in contract. The reality of the situation, which coincides with the law, can be appreciated by considering how a chartered accountant would draw up the accounts of an insurance society which had issued a policy of this kind and knew that an accident had occurred. A careful accountant would treat it as a liability as soon as the accident happened and value it at the full amount claimed by the Post Office.

When the two rights of action become vested in the same person, he can bring a single action against the insurance society, relying on the contractual right assigned to him by the Act.

[HARMAN L.J. But the rights transferred under section 1 (*b*) of the Act are only transferred if liability has been incurred; and in this case it is disputed.]

In the eyes of the law there is liability waiting to be proved; it may be disputed but it does exist. In this case there is also a statutory liability under section 8 of the Telegraph Act, 1878.

It is important to see what the two cases in 1928, which led to the enactment of the Act of 1930, decided. *Harrington's* case [7] proceeded on the basis that the right of the insured to recover from his insurers arose immediately he incurred liability to the injured party, and not when judgment was obtained against the insured. That decision was applied by Tomlin J. in the *Hood's Trustee* case,[8] later approved by the Court of Appeal, and therefore binding on this court. If the facts are examined, it is clear that the decision in the *Hood's Trustee* case [8] could only have been reached on the basis that the obligation to pay under the policy arose as soon as the tort occurred.

[LORD DENNING M.R. *Hood's* case [8] does seem to support that proposition.]

Of course the insurance moneys would not be paid until the damage was proved; but it would be possible to get a declaration that in the event of the insured being held liable he would be entitled to an indemnity.

[SALMON L.J. But that is not the procedure which has been adopted in this case.]

That is a matter of procedure; but the Post Office is nevertheless the statutory assignee of the right which arose at the moment the damage occurred.

[7] [1928] 1 Ch. 105.
[8] [1928] 1 Ch. 793.

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[SALMON L.J. If the insured person's rights are transferred to the third party, are they not subject to the conditions in the policy? The conditions of the policy forbid the insured person saying to his insurers: "I am liable to this third party and you must pay me".]

The conditions which require the insured to give the company all the help he can are personal obligations on the insured and are not transferred by the Act of 1930 to the prospective plaintiff. If they were binding on the injured third party, he would never be able to sue.

[SALMON L.J. So the insured could not sue his insurers, but the third party who succeeds to his rights can do so?]

Certainly the bankrupt cannot sue after his bankruptcy; and unless something has been done before the rights vest under the Act which enables the insurance society to repudiate the policy, the insurance society cannot repudiate liability after the bankruptcy. It may be that if the insurance company could show that the insured had failed to assist them before the action brought by the third party, that might be a defence; but it would not destroy the third party's right to sue the insurance company direct.

The statement of Devlin J. in *West Wake Price & Co.* v. *Ching* [9] was obiter, for he was not there considering the particular form of an indemnity clause and the liability that arises, nor was he considering procedural questions as to who can enforce what rights in particular circumstances; and what he said about a proved loss being a necessary condition precedent to liability is inconsistent with *Hood's* case,[10] to which he was not referred.

The further procedural difficulty arises in that, apart from the Act of 1930, if this were a provable debt the injured third party could not sue the tortfeasor after bankruptcy without obtaining the leave of the court: see section 7 of the Bankruptcy Act, 1914, and Williams on Bankruptcy, 17th ed. (1958), p. 72. If there is a non-provable debt for unliquidated damages the action can be brought, though the court has power to stop it: see section 9 of the Act of 1914; but there is nothing to be gained by such an action and the plaintiff who embarked on it would be simply wasting money. Similarly with a company in liquidation, the right to sue is subject to the approval of the court under section 231 of the Companies Act, 1948. If this is not a provable debt in a liquidation, the injured third party, even if he obtained leave to sue the company, would be without any remedy because he could not prove his debt

[9] [1957] 1 W.L.R. 45, 49.

[10] [1928] 1 Ch. 793.

in the liquidation nor share in the distribution of assets; and it is doubtful whether the court would give such leave, unless it was the only way of getting the money from the insurance society. The procedure proposed by the appellants involves fruitless litigation in order to be in a position to bring a second action. In this case, if the Post Office cannot continue its action against the insurance society it will be without a remedy unless it seeks a declaration.

Again, if either of the above processes is embarked on, there is no provision by which the injured plaintiff could recover his costs from anyone. An action against a bankrupt or a company in liquidation would under the law of bankruptcy and company law be purely nominal, would produce nothing, and would endanger the costs awarded to the injured plaintiff, while in no way affecting the person against whom it was brought.

[Reference was made to *Craig* v. *Royal Insurance Co. Ltd.* [11] and section 5 of the Workmen's Compensation Act, 1906.]

Griffiths Q.C. in reply. The criticism of the procedure proposed by the insurance society is tempered by the fact that this state of affairs will only occur in the rare case where either (*a*) the liability of the insured is not in issue or (*b*) the insurance society claims to be entitled to repudiate liability because of a breach by the insured of the policy conditions. In all other cases the insurance societies will settle the claim, as they settle thousands of other claims; and where liability and quantum are in dispute and the injured person sues the bankrupt or company in liquidation the insurance companies will stand behind the insured, as they always do, fight the claim on his behalf, and satisfy the judgment, including the costs, under the terms of the policy. The only extra step in which the injured party will be involved will be the seeking of leave of the court to sue either the bankrupt or the company in liquidation; and it is inconceivable that leave would not be given. On the facts in *Hood's Trustee* [12] it was not necessary to decide when the cause of action arose, and Tomlin J. had only to apply his mind to the right which arose on the judgment obtained after the first bankruptcy, so that what was said in that case on that matter does not bind this court. [Reference was also made to *Dickinson* v. *Del Solar*.[13]]

Where liability is disputed, the injured person has no right at all when the accident happens, not even the right to a declaration, for a declaration is a discretionary remedy and not a right. Cases

[11] (1914) 84 L.J.(K.B.) 333.
[12] [1928] 1 Ch. 793.
[13] [1930] 1 K.B. 376; 45 T.L.R. 637.

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under the Workmen's Compensation Acts do not assist, for the Act of 1930 is quite different from those Acts, which specifically placed the assurers in the shoes of their assured in order to give the workman a direct right of action. The Act of 1930 does not do that; and under it the third party cannot be in a better position than the assured.

In any event condition 3 of this policy puts the Post Office out of court, for it makes clear that the contractors could not establish their claim to indemnity by bringing an action setting up their own liability to the Post Office. Finally, the submission that the transferee under the Act takes the benefit but not the obligations of the insured is untenable: see *per* Lord Hanworth M.R. in *Freshwater* v. *Western Australian Assurance Co. Ltd.*[14] The contractual rights transferred by the Act of 1930 cannot be transferred without the conditions in the contract of insurance.

LORD DENNING M.R. The Post Office have a telegraph cable laid in the ground underneath St. John's Street, Huntingdon. In May, 1963, some contractors called Potter & Company Ltd. were proposing to dig a hole in the street so as to find a water main. On May 20 their representative met the Post Office engineer on the site and discussed the position of the cable and the proposed excavation. On May 24 Potters were carrying out the work when they struck the cable and damaged it. The Post Office claimed damages against Potters and sent in a bill for £839 10s. 3d. for repairing the cable. Potters refused to pay. They said that it was the fault of the Post Office because their engineer pointed out the wrong place.

Thus far it looked as if there would be an action by the Post Office against Potters to decide liability and the quantum of damages. But before the Post Office brought any action, on June 1, 1964, Potters went into liquidation. The Post Office considered the position. They found out that Potters were insured with the Norwich Union Fire Insurance Society Ltd. under a public liability policy, that is, covering their liability to third persons. On June 17, 1965, the Post Office brought an action. They brought it, not against Potters, the wrongdoers, but against Potters' insurers, the Norwich Union. The Post Office claimed that, once Potters went into liquidation, they were entitled to sue the insurance company direct. They had no right to do so at common law because there was no contract between them. But they claimed a right under the Third

[14] [1933] 1 K.B. 510, 515; 49 T.L.R. 131, C.A.

Parties (Rights against Insurers) Act, 1930. The insurance company denied that the Post Office could claim against them direct. The point was set down as a preliminary point. Donaldson J. held that the Post Office could sue the insurance company direct. The insurance company now appeal to this court.

In the days before the Act of 1930, when an injured person got judgment against a wrongdoer who was insured, and the wrongdoer then went bankrupt, the injured person had no direct claim against the insurance moneys. He could only prove in the bankruptcy. The insurance moneys went into the pool for the benefit of the general body of creditors: see *In re Harrington Motor Co. Ltd. ex parte Chaplin*,[1] applied in *Hood's Trustees* v. *Southern Union General Insurance Co. of Australasia*.[2] That was so obviously unjust that Parliament intervened. In the Act of 1930 the injured person was given a right against the insurance company. Section 1 says that: "Where under any contract of insurance a person . . . is insured against liabilities to third parties which he may incur," then in the event of the insured becoming bankrupt if he is an individual, or, in the case of the insured being a company, in the event of a winding-up,

> "if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred."

Under that section the injured person steps into the shoes of the wrongdoer. There are transferred to him the wrongdoer's "rights against the insurers under the contract." What are those rights? When do they arise? So far as the "liability" of the insured is concerned, there is no doubt that his liability to the injured person arises at the time of the accident, when negligence and damage coincide. But the "rights" of the insured person against the insurers do not arise at that time.

The policy says that "the company will indemnify the insured against all sums which the insured shall become legally liable to pay as compensation in respect of loss of or damage to property." It seems to me that the insured only acquires a right to sue for the money when his liability to the injured person has been established so as to give rise to a right of indemnity. His liability to the injured person must be ascertained and determined to exist, either

[1] [1928] 1 Ch. 105; 44 T.L.R. 58, C.A.

[2] [1928] 1 Ch. 793, C.A.

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by judgment of the court or by an award in arbitration or by agreement. Until that is done, the right to an indemnity does not arise. I agree with the statement by Devlin J. in *West Wake Price & Co.* v. *Ching*.[3] "The assured cannot recover anything under the main indemnity clause or make any claim against the underwriters until they have been found liable and so sustained a loss."

Under the section it is clear to me that the injured person cannot sue the insurance company except in such circumstances as the insured himself could have sued the insurance company. The insured could only have sued for an indemnity when his liability to the third person was established and the amount of the loss ascertained. In some circumstances the insured might sue earlier for a declaration, for example, if the insured company were repudiating the policy for some reason. But where the policy is admittedly good, the insured cannot sue for an indemnity until his own liability to the third person is ascertained.

It appears that in *Hood's Trustees* case,[4] it was assumed on both sides in the course of the argument and by the judge that the insured obtained a cause of action against the insurance company at the time when the accident happened. I think that assumption was incorrect. The decision in *Hood's* case [4] itself can be supported on other grounds, namely, that after the first bankruptcy there was a subsequent judgment against the bankrupt ascertaining the amount. Once that judgment was obtained against the bankrupt, he had a right to indemnity against the insurance company and this right vested in the first trustee in bankruptcy under section 38 (1) (*a*) of the Bankruptcy Act, 1914. It seems to me that, unless that judgment had been obtained, there would have been no right to an indemnity.

But there is a further point. When the rights of the insured are transferred to the injured person, they are transferred on the ordinary understanding, that is, subject to such conditions as the contract provides. Under condition 3 of this policy it is stipulated that:

> "No admission offer promise payment or indemnity shall be made or given by or on behalf of the insured without the written consent of the company which shall be entitled if it so desires to take over and conduct in the name of the insured the defence or settlement of any claim."

In the face of that condition I do not see how the insured could sue the insurance company before his liability is ascertained. He

[3] [1957] 1 W.L.R. 45, 49; [1956] 3 All E.R. 821.

[4] [1928] 1 Ch. 793.

A is not at liberty to say: "I *admit* I am liable and therefore I ought to recover an indemnity." He cannot make that admission: and therefore cannot sue.

In these circumstances I think the right to sue for these moneys does not arise until the liability of the wrongdoer is established and the amount ascertained. How is this to be done? If there is an B unascertained claim for damages in tort, it cannot be proved in the bankruptcy; nor in the liquidation of the company. But nevertheless the injured person can bring an action against the wrongdoer. In the case of a company, he must get the leave of the court. No doubt leave would automatically be given. The insurance company can fight that action in the name of the wrongC doer. In that way liability can be established and the loss ascertained. Then the injured person can go against the insurance company.

In confirmation of this view, I would remark that at the time when the Act of 1930 was passed, the practice in these courts was to keep secret the fact that the defendant was insured. It was misD conduct on the part of counsel to indicate to the jury that the defendant was insured. If this Act had enabled the injured person to sue the insurance company direct, before liability was ascertained, it would have cut right across that practice. I am sure that at that date the legislature never contemplated any such thing. Of course it is different now. We assume that the defendant in an action of E tort is insured unless the contrary appears. Nevertheless, casting one's mind back to 1930, I am sure the legislature did not contemplate an action in tort against an insurance company direct.

There is a further point. If a third person, who suffered personal injury, could sue the insurance company direct, there would be a strange anomaly about the period of limitation. The action of the F injured person against the wrongdoer (for the tort) would be barred after three years from the accident, but his action against the insurance company (as a transferee of the rights under the contract) would not be barred until six years from the accident.

This is simply a matter of procedure. I think the right procedure is for the injured person to sue the wrongdoer, and having got judgG ment against the wrongdoer, then make his claim against the insurance company. This attempt to sue the insurance company direct (before liability is established) is not correct.

I would, therefore, allow the appeal.

HARMAN L.J. The Post Office desires to sue the insurance company direct, that is to say, take a short cut. The argument is that

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under the Act of 1930 the rights of Potters against the insurers vest in the third party, that is to say, the Post Office. That all sounds quite simple until you begin to think that here in fact there was not an admitted liability. It was not a mere matter of quantifying the amount for which the insurance company might be liable. Their allegation was that there was no liability at all because the insured had been misled by the Post Office and therefore had a good answer to the original claim. That seems to make it fairly clear that the kind of action contemplated is a very inconvenient form of action, to say the very least of it. Here will be the Post Office suing the insurance company and having to prove on the way, so to speak, what the circumstances of the accident were—the party concerned in the accident, so to call it, not being a party to the suit at all.

However, I must say that it seemed to me at one time, having regard to *Hood's* case,[5] which has been mentioned by my Lord, that that was a course which could be taken, however inconvenient it might be; because I accept the view suggested in *Hood*[5] that the rights, whatever they may be, arise at the time when the wrongdoing is committed, if there is a wrongdoing. Therefore it might be said that what is assigned to the Post Office are all those rights. I think it may be accepted that it is so, as far as I am concerned; but even so, the contract contains not only rights, but limitations of those rights. You cannot, I think, assign to somebody part of the rights under the contract without assigning to him the condition subject to which those rights exist. Consequently, I think the Post Office is saddled with the inability of Potters to sue direct themselves before the liability is ascertained, because that would amount to a breach of condition 3 of the policy which would in itself be a defence to the insurance company.

Therefore, I would decide this case on the narrow ground that the right assigned to the Post Office by the statute must be coupled with the rest of the particular rights and obligations which make up the contract of insurance. You cannot pick out one bit—pick out the plums and leave the duff behind. Therefore I think that as Potters could not sue, so their statutory assignees, the Post Office, cannot sue until the amount has been ascertained and quantified.

That being so, I think this form of action is incompetent and ought not to be allowed, notwithstanding the inconvenience of having to get leave in the liquidation to bring the action. I suppose it is possible that such leave might be refused, but I do not think we

[5] [1928] 1 Ch. 793.

need contemplate that until it happens; it seems to me to be unlikely. It seems to me that the Post Office should get leave to bring the action, and although they cannot enforce any judgment they get against a company in liquidation because it is an unliquidated claim, they will then be in a position to go against the insurance company by reason of the help given by the statute. The statute will be quite effective in its proper place. It does not enable this particular jump to be made which the Post Office would have us allow.

I would, therefore, allow the appeal.

SALMON L.J. On May 24, 1963, Potters admittedly damaged a telegraph cable belonging to the Post Office. Thereafter the Post Office were taking the line that they were entitled to be paid £839 10s. 3d. by Potters, which was the amount by which they stated they were out of pocket by reason of the damage to the cable. Potters, on the other hand, were saying that they were under no legal liability because the damage had in fact been caused owing to some wrong information which they had received from the Post Office. Potters then went into liquidation; and on June 17, 1965, the Post Office sued Potters' insurers, claiming the sum of £839 10s. 3d. in the circumstances which I have described. They were claiming against Potters' insurers as statutory assignees of Potters' rights under their policy of insurance.

The case really resolves itself into this simple question: Could Potters on June 17, 1965, have successfully sued their insurers for the sum of £839 10s. 3d. which they were denying they were under any obligation to pay to the Post Office? Stated in that way, I should have thought the question admits of only one answer. Obviously Potters could not have claimed that money from their insurers. It is quite true that if Potters in the end are shown to have been legally liable for the damage resulting from the accident to the cable, their liability in law dates from the moment when the accident occurred and the damage was suffered. But whether or not there is any legal liability and, if so, the amount due from Potters to the Post Office can, in my view, only be finally ascertained either by agreement between Potters and the Post Office or by an action or arbitration between Potters and the Post Office. It is quite unheard of in practice for any assured to sue his insurers in a money claim when the actual loss against which he wishes to be indemnified has not been ascertained. I have never heard of such an action and there is nothing in law that makes such an action

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possible. I agree with the statement of Devlin J. in *West Wake Price & Co.* v. *Ching*,[6] to which the Master of the Rolls has already referred. This statement is obiter but I think it correctly states the legal position, although it does not expressly point out that liability and quantum can be ascertained not only by action but also by arbitration or agreement. In any event, condition 3 of the policy of insurance, for the reasons already stated, would have made it impossible for the assured to sue the insurance company. But quite apart from condition 3, I would have thought that no such action is maintainable.

It is quite true that this is a narrow procedural point and from one point of view it cannot matter very much whether the defendant is called the Norwich Union Fire Insurance Society Ltd. or A. J. G. Potter & Sons Ltd. It might be said that the action would proceed in exactly the same way whoever may be the defendant because under the insurance policy the insurers are entitled to conduct the defence. That may be so; but from a broad commercial point of view I can well understand why the insurers do not want their name to appear on the record as defendants. If this Act gave third parties the right to sue insurance companies direct, it would mean that the cause lists would contain the names of many defendant insurance companies; and this could not be good for their business. If an insurance company were constantly being sued, any customer or potential customer would or might assume, quite wrongly, that the company was habitually repudiating liability under its policies with its own customers. Therefore, I can understand the reason why this case has been fought up to this court. As far as the Post Office is concerned, it cannot be in any way prejudiced by having to sue Potters. It is almost inconceivable that they would not obtain leave in the winding-up to bring the action. I can, of course, contemplate cases in which an insurance company is in a shaky position and it might be necessary for the plaintiffs to sue the insurance company after having recovered judgment against the assured. This, of course, is not such a case. Such cases would be very, very rare.

I realise that it would be more convenient in such a case for the plaintiff to have the right to sue the insurers direct and thus save valuable time. Whatever may be the rule of convenience is, however, beside the point. In law, I am satisfied that Potters had no claim in June, 1965, against their insurers. For that reason it is quite clear that the Post Office has no claim against the insurers,

[6] [1957] 1 W.L.R. 45, 49.

A for they stand in Potters' shoes, and can be in no better position than Potters.

I would accordingly allow the appeal.

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Appeal allowed.
Judgment in action entered for defendants.

B

Solicitors: *William Easton & Sons for Mills & Reeve, Norwich; J. P. Ricks, Solicitor, The Post Office.*

M. M. H.

C

[COURT OF APPEAL]

E. R. IVES INVESTMENT LTD. *v.* HIGH

C. A.
1966
Nov. 24, 25, 28
LORD DENNING M.R., DANCKWERTS and WINN L.JJ.

D [Plaint No. W. 7182]

Easement—Right of way—Equitable rights of passage—Proprietary estoppel—Whether "equitable easement"—Whether registrable as land charge—Law of Property Act, 1925 (15 & 16 *Geo.* 5, *c.* 20), *s.* 199 [1]*—Land Charges Act*, 1925 (15 & 16 *Geo.* 5, *c.* 22), *ss.* 10 (1), 13 (2).[2]

E *Equity—Mutual benefit and burden—Equity from acquiescence—Proprietary estoppel—Right of way over yard for encroachment of foundations—Expenditure of money in reliance on right—Whether equitable rights registrable—Law of Property Act*, 1925, *s.* 199 (1)*—Land Charges Act*, 1925, *ss.* 10 (1), 13 (2).

F [1] Law of Property Act, 1925, s. 199: "(1) A purchaser shall not be prejudicially affected by notice of—(i) any instrument or matter capable of registration under the provisions of the Land Charges Act, 1925, . . . which is void or not enforceable as against him under that Act . . . by reason of the non-registration thereof."

G [2] Land Charges Act, 1925, s. 10: "(1) The following classes of charges on, or obligations affecting, land may be registered as land charges in the register of land charges, namely:—. . . Class C:—A mortgage charge or obligation affecting land of any of the following kinds . . . (iv) Any contract by an estate owner . . . including a contract conferring . . . a valid option of purchase, a right of pre-emption or any other like right . . . (. . . referred to as an 'estate contract'). Class D:—A charge or obligation affecting land of any of the following kinds, namely:— . . . (iii) Any easement right or privilege over or affecting land . . . being merely an equitable interest (. . . referred to as an 'equitable easement')."

S. 13: "(2) A land charge of Class B, Class C or Class D, . . . shall . . . be void as against a purchaser of the land charged therewith . . . unless the land charge is registered in the appropriate register before the completion of the purchase."