[HIGH COURT OF AUSTRALIA.]

HILEY . . . . . APPELLANT;
DEFENDANT,

AND

THE PEOPLES PRUDENTIAL ASSURANCE COMPANY LIMITED (IN LIQUIDATION) AND OTHERS . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1938.

SYDNEY, *April* 12, 13; *Aug.* 25.

Latham C.J., Rich, Starke and Dixon JJ.

Company—Life-assurance policy—Mortgage by policy-holder to company—Mortgage transferred by company to third party—Liquidation of company—Repudiation by company of obligations under the policy—Validity of transfer—Suit—Compromise between third party and liquidator of company—Retransfer of mortgage to company—Winding up—Company and policy-holder—"Mutual dealings"—Set-off—Bankruptcy Act 1924-1933 (*No.* 37 *of* 1924—*No.* 66 *of* 1933), *sec.* 82*—*Companies Act* 1899 (*N.S.W.*) (*No.* 40 of 1899), *sec.* 264 (1).*

The appellant, a policy-holder in a life-assurance company, borrowed money from the company in pursuance of a scheme enabling holders of such policies to purchase homes and as security for its repayment gave a mortgage over

* Sec. 82 of the *Bankruptcy Act* 1924-1933 provides that "where there have been mutual credits, mutual debts, or other mutual dealings between a bankrupt and any person proving or claiming to prove a debt in the bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively."

Sec. 264 (1) of the *Companies Act* 1899 (N.S.W.) provides that "in the winding up . . . of any company . . . either voluntarily or by or under the supervision of the court, as the case may be, the same rules shall prevail and be observed as regards—(*a*) the respective rights of secured and unsecured creditors; and (*b*) the declaration and distribution of dividends; and (*c*) the proof and allowance of debts or claims against the assets of the company, as may be in force for the time being under the laws of bankruptcy with respect to the estates of bankrupts."

certain land and deposited his policy. The mortgage, together with similar mortgages by other mortgagors, was transferred by the assurance company by way of security to another company and later, also by way of security and with such other mortgages, by that other company to a bank. Subsequently the assurance company was ordered to be wound up. The official liquidator gave notice to the appellant that the assurance company would not carry out its obligations under the policy. After the commencement of the liquidation the validity of the transfers of mortgage, including the transfers of the mortgage given by the appellant, was challenged on the ground of *ultra vires*. A compromise of the matters in dispute was made between the assurance company, the transferee company and the bank, whereby the bank agreed to retransfer to the assurance company some of the mortgages, including the appellant's mortgage.

Held, by *Rich*, *Starke* and *Dixon* JJ. (*Latham* C.J. dissenting), that, as at the commencement of the winding up the assurance company was entitled to redeem the appellant's mortgage which it had so transferred by way of security and the grounds of its claim to set aside the transfer existed, and by asserting the title or claim then existing and not by a new and independent transaction it had again become entitled to the full beneficial interest in his mortgage, the appellant was entitled, under sec. 82 of the *Bankruptcy Act* 1924-1933, as applied by sec. 264 (1) of the *Companies Act* 1899 (N.S.W.), to set off against the mortgage debt the damages sustained by him by reason of the company's repudiation of its obligations under the policy.

In re City Life Assurance Co. Ltd., (1926) Ch. 191, considered.

Decision of the Supreme Court of New South Wales (*Nicholas* J.) reversed.

APPEAL from the Supreme Court of New South Wales.

In December 1923, William Thomas Hiley effected an assurance with the Peoples Prudential Assurance Co. Ltd. upon his life for £1,000. The company had adopted a scheme, referred to as the House Property Purchase System, under which, after a certain time had expired, and a certain number of premiums had been paid, an advance would be made for the purpose of enabling the policy-holder to purchase a home, the advance to be secured by a mortgage of the policy and of the home, and not to be called up until the policy moneys became payable. Particulars of the House Property Purchase System were indorsed on the reverse side of the policy issued to Hiley. On 24th November 1927, in accordance with that indorsement, Hiley borrowed from the company the amount of the face value of the policy upon the security of certain land of which he was the purchaser. This mortgage was registered under the

H. C. OF A. 1938.

HILEY v. PEOPLES PRUDENTIAL ASSURANCE CO. LTD.

provisions of the *Real Property Act* 1900 (N.S.W.). Hiley also executed a memorandum of deposit in favour of the company to secure collaterally the repayment of the mortgage debt, and he deposited the policy accordingly. By an instrument bearing the same date the company undertook that, so long as Hiley should punctually pay the premiums on the policy and also punctually pay the interest as mentioned in the mortgage, and observed and performed all the other covenants and conditions on the company's behalf contained in the mortgage and in the collateral security, the company would not call upon him to repay the principal sum until the policy matured or the moneys thereby assured became payable. On 31st July 1929, Hiley's mortgage, together with a number of other mortgages by various mortgagors to the company, was transferred by the company to the Federal Building Assurance Co. Ltd. The transfer, although absolute in form, was in fact given by way of security. The precise sum intended to be so secured did not appear, but it was to be ascertained in the manner described in the transfer. The transfer was registered under the *Real Property Act* 1900 (N.S.W.) on 29th January 1930, and on 6th February 1930 the Federal Building Assurance Co. Ltd. transferred Hiley's mortgage, with numerous others, to the Commercial Bank of Australia Ltd. Although absolute in form this transfer also was by way of security. It was duly registered under the above-mentioned Act. On 14th April 1930, the company was ordered to be wound up by the court. Up to the commencement of the liquidation Hiley in fact paid the interest on the mortgage and the premiums regularly but never punctually *ad diem*. He paid the interest within a maximum of sixteen days of its due date, but the last premium was more than three months overdue when it was paid. The company accepted all the payments and did not in fact attempt to call up the mortgage moneys before the winding-up order, at which date no interest or premium was overdue. On 3rd November 1930, the official liquidator of the company gave notice to Hiley that the company would not carry out its obligations to him under the contract of assurance effected by the policy, and invited Hiley to make any claim to which he deemed himself entitled.

A summons was taken out by the Commercial Bank of Australia Ltd. under the provisions of the *Moratorium Act* 1930 (N.S.W.), asking leave to enforce the remedies of a mortgagee against Hiley. In these proceedings Hiley set up the company's repudiation of the policy of assurance as a matter affecting the Commercial Bank of Australia Ltd. and disentitling it to the benefit of the mortgage. He also objected that the transfers of the mortgage by the company to the Federal Building Assurance Co. Ltd. and by that company to the Commercial Bank of Australia Ltd. were each void on the ground of *ultra vires* and voidable for fraud of which, he alleged, the bank had notice. On 10th October 1933, the summons was stood over generally for the purpose of enabling a suit to be instituted to determine the questions thus raised.

A suit, in which Hiley, the Federal Building Assurance Co. Ltd. (in liquidation) and the Commercial Bank of Australia Ltd. were joined as defendants, was, accordingly, instituted by the liquidator of the company on 1st November 1933. The relief claimed by the company in the statement of claim, as amended under an order made by the court on 29th November 1935, included declarations (*a*) that the transfer by it to the Federal Building Assurance Co. Ltd. was void; (*b*) that the transfer by that company to the Commercial Bank of Australia Ltd., was void; (*c*) that the Commercial Bank of Australia Ltd. held the mortgage in trust for the company; (*d*) that the mortgage was valid against Hiley; and (*e*) that the company was, subject to the *Moratorium Act*, entitled to enforce the mortgage against Hiley.

Other mortgages had been dealt with in much the same way as Hiley's mortgage, and, including this mortgage, twenty-nine mortgages securing principal sums amounting to £17,290 were affected.

A compromise of the matters in dispute in the suit was, on 3rd June 1936, made between the parties thereto other than Hiley by which, with the consent of the Federal Building Assurance Co. Ltd., it was agreed that the Commercial Bank of Australia Ltd. should transfer to the company certain of the mortgages, including Hiley's mortgage, securing principal sums amounting to £8,647, and should retain as its absolute property the remainder of the mortgages, by which principal sums amounting to £8,643 were

H. C. OF A. 1938.

HILEY v. PEOPLES PRUDENTIAL ASSURANCE CO. LTD.

secured. It was also agreed that on the conclusion of the suit the Commercial Bank of Australia Ltd. would execute all assurances necessary to vest in the company the mortgages allotted to it, and that the suit should proceed as against Hiley. An additional term was added to the compromise on 7th October 1936 by which the Commercial Bank of Australia Ltd. undertook to the Equity Court to give to the various mortgagors whose mortgages had been accepted by the bank under the compromise, provided they were in the same legal position as Hiley, the same principle of set-off, if any, as Hiley might in the suit establish himself as entitled to as against the company.

Accordingly, under an order of the court dated 19th August 1937, the statement of claim was, with a view to obtaining relief only against Hiley, further amended by striking out the allegations upon which the company had based its claim that the transfers by it to the Federal Building Assurance Co. Ltd., and by that company to the Commercial Bank of Australia Ltd., were void.

In his statement of defence as amended and re-amended, Hiley relied on a ground of defence that the company was bound by its undertaking not to call up his mortgage, and that this undertaking was binding on the liquidator of the company. This defence, however, was not pressed at the hearing of the suit before *Nicholas* J., who granted leave to the Federal Building Assurance Co. Ltd. and the Commercial Bank of Australia Ltd. to withdraw from the hearing of the suit. The only question that his Honour was called upon to decide was whether the company, having been ordered to be wound up, and thereby having become incapable of carrying out the contract of life assurance, Hiley was entitled to set off the damages suffered by him against the amount of his mortgage debt, or whether his right in respect of those damages was limited to a right to prove for them in the winding up with other creditors of the company.

Nicholas J. declared (*a*) that the mortgage given by Hiley to the company was valid and subsisting and that the company was entitled to the benefit thereof and, subject to the provisions of the *Moratorium Act* 1932-1936 (N.S.W.), to enforce payment of the mortgage moneys; and (*b*) that Hiley had no right to set off against the amount secured

by the mortgage the damage suffered by him by reason of the repudiation by the company of its obligations under the policy.

From that decision Hiley, by special leave, appealed to the High Court.

At the hearing of the appeal there was not any appearance by or on behalf of the Federal Building Assurance Co. Ltd. (in liquidation) and the Commercial Bank of Australia Ltd., although each had been notified thereof.

Dudley Williams K.C. and *Hill*, for the appellant.

Dudley Williams K.C. The validity of the mortgage is not disputed, but the appellant is entitled to set off against the mortgage debt the damages suffered by him as a result of the repudiation by the respondent company. There have been "mutual dealings" between the appellant and the respondent within the meaning of that expression in sec. 82 of the *Bankruptcy Act* 1924-1933, which is made applicable by sec. 264 of the *Companies Act* 1899 (N.S.W.) (*In re National Benefit Assurance Co. Ltd.* (1); *In re City Life Assurance Co. Ltd.* (2)).

[STARKE J. referred to *Peat* v. *Jones & Co.* (3).]

The right of set-off arose as at the date of the liquidation of the company (*In re Daintrey*; *Ex parte Mant* (4)). At the date of the institution of the suit the respondent company did not have a beneficial interest in the mortgage; therefore the company was not in a position to bring the suit against the appellant (*Evans* v. *Bagshaw* (5); *Daniell's Chancery Practice*, 5th ed. (1871), vol. I., p. 329, note *k*). If, on the other hand, the company did have a beneficial interest in the mortgage, then the appellant was entitled, as a matter of course, to a set-off (*In re Asphaltic Wood Pavement Co.*; *Lee & Chapman's Case* (6)).

Hill. In *In re City Life Assurance Co. Ltd.* (*Stephenson's Case*) (7) the liquidator sought to recover as trustee for the assignee

(1) (1924) 2 Ch. 339, at p. 345.
(2) (1926) Ch. 191.
(3) (1881) 8 Q.B.D. 147.
(4) (1900) 1 Q.B. 546.
(5) (1870) 5 Ch. App. 340.
(6) (1885) 30 Ch. D. 216, at pp. 220-222, 224, 225.
(7) (1926) Ch., at p. 196.

H. C. OF A. 1938. HILEY v. PEOPLES PRUDENTIAL ASSURANCE CO. LTD.

and claimed no beneficial interest whatsoever in the mortgage for the mortgagee, therefore that case is distinguishable from this case. The appellant was entitled to a set-off in respect of damages suffered by him to the extent of any beneficial interest the liquidator had in the mortgage as at the date of the liquidation of the company. At the moment of the winding up an action for the mortgage debt could not have been brought against the appellant by the liquidator as trustee for the assignee (*Gurney* v. *Seppings* (1)).

[LATHAM C.J. referred to *In re Milan Tramways Co.*; *Ex parte Theys* (2); *In re National Benefit Assurance Co. Ltd.* (3).]

It is the dealing between the parties that creates the right which must be looked at, not the subsequent dealings. By entering into the mortgage the parties by their mutual dealing have created the relationship of mortgagee and mortgagor. Though the company on liquidation could not sue for the mortgage debt, it could do so when the debt matured. Though it had assigned the debt by way of sub-mortgage it still retained in equity a right that if and when the sub-mortgage was discharged it should be put back into its original position.

Maughan K.C. (with him *Hooton*), for the respondent, The Peoples Prudential Assurance Co. Ltd. (in liquidation). The undertaking was given by the company subject to certain conditions. Those conditions were not fulfilled; therefore the undertaking was no longer binding on the company. In any event, upon the liquidation of the company the undertaking ceased to have any effect (*In re City Life Assurance Co. Ltd.* (4)). The facts as they existed at the date of the liquidation did not create a right of set-off in favour of the appellant. The assignment divested the company of the mortgage debt (See sec. 42, *Real Property Act* 1900 (N.S.W.)). That assignment destroyed the mutuality as between the company and the appellant (*In re City Life Assurance Co. Ltd.* (5)). The question which arose in that case was as between mortgagor and mortgagee; it was not as between mortgagor and sub-

(1) (1846) 2 Ph. 40; 41 E.R. 856.
(2) (1884) 25 Ch. D. 587, at p. 591.
(3) (1924) 2 Ch., at p. 345.
(4) (1926) Ch. 191; 70 Sol. Jo. 108; 95 L.J. Ch. 65; 42 T.L.R. 45; 134 L.T. 207.
(5) (1926) Ch., at pp. 219, 221, 223.

mortgagee. In *Lee & Chapman's Case* (1), though there was a charge, there was not any assignment of a proportion of the moneys, even in terms, and mutuality still existed between the parties; therefore that case is distinguishable. At the date of liquidation the company's rights in respect of the mortgage were against the Commercial Bank of Australia Ltd. only; it had not rights against the appellant. The suit was instituted for the purpose of affording the appellant an opportunity of establishing his allegations. Having regard to the course the proceedings took in the court below this court should not upset the decree merely because a technical point could have been taken in the court below. The fact that the appellant's mortgage was, on the settlement, retransferred to the company was entirely fortuitous and was not in pursuance of any right existing at the date of the liquidation. In deciding whether there was a right of set-off in the appellant as at the date of liquidation the court is not entitled to consider any property subsequently acquired by the company or its liquidator. There can be no relation back to the date of the liquidation where the asset was recovered in virtue of a right which did not exist on that date. The obligations provable by the company and the appellant are not mutual credits or mutual debts within the meaning of sec. 82 of the *Bankruptcy Act* 1924-1933. Any mutual dealings between those parties ceased when the mortgage was transferred by the company. What existed at the date of liquidation was not a dealing in any sense of the word.

Dudley Williams K.C., in reply. Acceptance by the company of interest paid out of time amounted to a waiver by the company of a breach of conditions under the mortgage and the undertaking. The basis of the decision in *In re City Life Assurance Co. Ltd.* (2) was that the liquidator of the company there concerned sued to recover the moneys not for the benefit of the company but for the benefit of the assignees; the court decided that there was no set-off as between the mortgagor and the assignees. Here the appellant claims a right of set-off as between himself as mortgagor and the company as mortgagee. The company instituted this suit to recover the moneys on its own account and not on account of any

(1) (1885) 30 Ch. D. 216.

(2) (1926) Ch. 191.

H. C. OF A. 1938. HILEY v. PEOPLES PRUDENTIAL ASSURANCE CO. LTD.

third party. All the requirements of sec. 82 of the *Bankruptcy Act* 1924-1933 have been complied with. The company had an interest in the mortgage debt at the date of liquidation; it had a right to redeem the debt. As the debt was assigned by way of mortgage only the mutuality between the parties has not been broken (*In re Daintrey*; *Ex parte Mant* (1)).

Cur. adv. vult.

Aug. 25.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a decretal order made by *Nicholas* J. in a suit in which the plaintiff, the Peoples Prudential Assurance Co. Ltd. (in liquidation), sued for a declaration that a mortgage given to it by the defendant William Thomas Hiley was a valid and subsisting mortgage. Hiley relied upon the provisions of sec. 264 of the *Companies Act* 1899 (N.S.W.), which makes applicable, in the liquidation of a company, the provisions of sec. 82 of the Commonwealth *Bankruptcy Act* 1924-1933. That section provides for set-off in the case of mutual credits, mutual debts or other mutual dealings between a bankrupt and any person proving or claiming to prove a debt in the bankruptcy. *Nicholas* J. held that the mortgage was valid and subsisting and declared that the defendant had no right of set-off.

The facts are somewhat complicated and the course of the pleadings in the action was tortuous. It will, I think, be most convenient to summarize the facts, with a statement of the relevant dates.

6th December 1923.—Hiley took out a life policy with the plaintiff company for £1,000. The company had adopted a scheme under which, after a certain time had expired, and a certain number of premiums had been paid, an advance would be made for the purpose of enabling the policy-holder to purchase a home, the advance to be secured by mortgages of the policy and of the home, and not to be called up until the policy moneys became payable.

24th November 1927.—Hiley gave a mortgage to the company over land owned by him to secure the sum of £1,000. The mortgage was registered under the *Real Property Act* 1900 (N.S.W.). This is the mortgage upon which the plaintiff sues.

(1) (1900) 1 Q.B. 546.

24th November 1927.—The defendant Hiley executed a memorandum of deposit in favour of the company to secure collaterally the repayment of the mortgage debt, and deposited the policy accordingly.

24th November 1927.—The company executed an undertaking to Hiley by which the company undertook not to call upon Hiley to repay the principal sum until the policy matured.

31st July 1929.—The company transferred the mortgage to the Federal Building Assurance Co. Ltd. This transfer was registered. Though absolute in form, it was a transfer by way of sub-mortgage.

6th February 1930.—The Federal Building Assurance Co. Ltd. transferred the mortgage to the Commercial Bank of Australia Ltd. This transfer was registered. Though absolute in form, the transfer was by way of sub-mortgage.

14th April 1930.—The plaintiff company was ordered to be wound up by the court.

3rd November 1930.—The official liquidator of the plaintiff company gave notice to Hiley that the company would not carry out its obligations under the policy, and invited Hiley to make any claim to which he deemed himself entitled.

27th September 1933.—A summons by the Commercial Bank under the provisions of the *Moratorium Act* 1930 (N.S.W.) asking leave to enforce the remedies of a mortgagee against Hiley was heard. The hearing was adjourned for the purpose of enabling a suit to be instituted to determine the validity of a claim alleged to be set up by Hiley that the transfers of the mortgage by the plaintiff to the Federal Building Assurance Co. Ltd. and by that company to the bank were each *ultra vires*.

1st November 1933.—Statement of claim in this suit claiming a declaration that the mortgage was valid (subject to the *Moratorium Act*), that the plaintiff was entitled to recover moneys owing thereon, and that the transfers of the mortgage were void.

3rd June 1936.—A compromise of the matters in dispute in the suit between the plaintiff and the bank was made between the plaintiff and the bank, with the consent of the Federal Building Assurance Co. Ltd., the suit to proceed against Hiley. Under this compromise it was agreed that some twenty-nine mortgages should be divided

H. C. OF A. 1938.

HILEY v. PEOPLES PRUDENTIAL ASSURANCE CO. LTD.

Latham C.J.

between the plaintiff and the bank. Hiley's mortgage happened to be one of the mortgages which the bank agreed to transfer to the plaintiff. The transfer has not actually been made, but, by reason of this compromise agreement, the plaintiff became entitled in equity to the rights of a mortgagee under the mortgage free from any encumbrances created by the sub-mortgages.

26th August 1937.—The statement of claim, which had already been amended once, was further amended by striking out the allegations upon which the plaintiff had based the claim that the transfers to the Federal Building Assurance Co. Ltd. and the bank were void. Thus the suit really became a suit by the plaintiff mortgagee company in liquidation against the mortgagor for the recovery of the moneys secured by the mortgage. The statement of claim still alleged transfers by way of sub-mortgage, and also alleged the compromise by which the mortgage again became vested in the plaintiff as mortgagee.

In 1933, when the suit was instituted, the plaintiff was not the registered proprietor of and was not entitled in equity to Hiley's mortgage. The suit at that time was a suit instituted for the purpose of setting aside the transfers of that mortgage to the Federal Building Assurance Co. Ltd. and the bank. The plaintiff became entitled to the mortgage as proprietor, not because the claim to set aside the transfers was either admitted or upheld, but only by reason of the compromise which was made in 1936. The suit then, as already explained, became simply a suit between the plaintiff as mortgagee and the defendant Hiley as mortgagor.

The claim of the plaintiff was obviously open to the objection that the right sought to be enforced did not exist at the time when the suit was commenced. The respondent relied upon this objection at the hearing of the appeal. The objection would have been fatal (to this particular suit) if it had been made and pressed in the proceedings before the Supreme Court (*Evans* v. *Bagshaw* (1)). The result would have been that this suit would have been abandoned, the costs incurred would have been wasted, and a new suit would have been instituted. The amended statement of claim alleged in par. 22 the compromise of 1936 whereby Hiley's mortgage was

(1) (1870) 5 Ch. App. 340.

" allotted " to the plaintiff. There was no demurrer to this pleading. So far from objecting that evidence to prove this fact was inadmissible for the purpose of supporting the plaintiff's case, the defendant at the trial admitted par. 22, subject to the production of the document recording the compromise. This course becomes intelligible when the further fact is stated that the parties other than Hiley had agreed in writing that his case was to be a test case for the purpose of determining the rights of all persons who were in the same position as Hiley, that is, whose mortgages had been transferred by way of sub-mortgage and then retransferred to the plaintiff under the compromise. Obviously the proceedings would completely fail to serve the purpose of a test case if the objection mentioned were allowed to prevail. Hiley was not a party to the written agreement, but the case was fought as a test case. The parties treated the suit as if it had commenced with the amended statement of claim. Accordingly I do not think that the objection mentioned should be allowed at this stage of the proceedings.

The defendant did not contend that the undertaking of 24th November 1930 not to enforce the mortgage until the policy matured constituted a defence to the action, because that undertaking was conditional upon all interest being punctually paid, and interest had not been so paid. Further, the case of *In re City Life Assurance Co.* (1) showed that such an undertaking did not provide the defendant with a defence in the circumstances of this case (See per *Pollock* M.R. (2), per *Warrington* L.J. (3), and per *Sargant* L.J. (4)). The only defence relied upon was that based upon sec. 82 of the *Bankruptcy Act*, which was made applicable by sec. 264 of the *Companies Act* 1899.

The Commonwealth *Bankruptcy Act*, sec. 82, provides: " Where there have been mutual credits, mutual debts, or other mutual dealings between a bankrupt and any person proving or claiming to prove a debt in bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively."

(1) (1926) Ch. 191.
(2) (1926) Ch., at p. 216.
(3) (1926) Ch., at pp. 220, 221.
(4) (1926) Ch., at pp. 221, 222.

H. C. OF A. 1938. HILEY v. PEOPLES PRUDENTIAL ASSURANCE CO. LTD. Latham C.J.

The transaction between Hiley and the plaintiff was a mutual dealing which resulted in mutual debts. The liability of an insurance company upon its policies forms a mutual debt or mutual dealing with a policy-holder who has borrowed money on the policy from the assurance company. The claim of the policy-holder for damages for the repudiation of the policy is a claim for unliquidated damages. Such a claim can be proved in the winding up and it can be the subject of set-off against a mortgage debt due from the policy-holder to the company, although such a claim, if uncertain in amount at the time of liquidation, would not fall within the statutes of set-off, 2 Geo. II. c. 22, sec. 13, and 8 Geo. II. c. 24, sec. 5 (See *In re City Life Assurance Co. Ltd.* (1); *In re National Benefit Assurance Co. Ltd.* (2)).

The rights of the parties are to be taken and ascertained as at the time of liquidation. Unless at that time there existed mutual rights the enforcement of which would result in mutual liabilities the section cannot apply (*In re Daintrey*; *Ex parte Mant* (3); *In re City Equitable Fire Insurance Co. Ltd.* [*No.* 2] (4)).

If there was at that time no mutuality, or if any previously existing mutuality had at that time been displaced by the action of the parties or of one of the parties, there is no right of set-off (*In re City Life Assurance Co.* (5)). This principle is emphasized in *In re Daintrey*; *Ex parte Mant* (6). In that case reference is made to what *Selborne* L.C. said in *In re Milan Tramways Co.*; *Ex parte Theys* (7): "The line is drawn at the time of the bankruptcy" (in this case at the time of the liquidation), "and the rights of the parties are not to be altered by subsequent transactions."

If the liquidation of the plaintiff company had taken place before that company had transferred the mortgage, there is no doubt that Hiley would have been entitled to set off against the mortgage debt the claim for damages for repudiation by the company of its liability under the policy. On 14th April 1930, however, when the winding-up order was made, the position was that the plaintiff no longer was the registered owner of the mortgage. It had transferred the mortgage

(1) (1926) Ch., at pp. 201, 202.
(2) (1924) 2 Ch. 339.
(3) (1900) 1 Q.B. 546.
(4) (1930) 2 Ch. 293, at p. 310.
(5) (1926) Ch., at p. 221.
(6) (1900) 1 Q.B., at pp. 568, 574.
(7) (1884) 25 Ch. D., at p. 591.

by way of sub-mortgage. In June 1936, by the compromise, the plaintiff again became the owner of the mortgage. The first question is whether the transfers to the Federal Building Assurance Co. Ltd. and the bank deprived Hiley of the right of set-off which he would otherwise have had, and the second question is whether, if they did, the effect of the compromise was to reinstate or revive that right.

It is necessary to examine carefully the position as it actually existed at the date of liquidation (14th April 1930). At that date there is no doubt that Hiley had an enforceable claim against the plaintiff. Did the plaintiff then have any enforceable claim against Hiley ? Could the plaintiff have sued Hiley in any form of action so as to obtain a judgment against Hiley for a sum of money ? Only sums of money can be set off. Did the plaintiff then have any right the enforcement of which would put it in a position to make a money claim against Hiley ? The plaintiff had transferred the mortgage, and, by virtue of the *Real Property Act* 1900, sec. 52, all the plaintiff's rights of action against Hiley on the mortgage had been transferred to and were vested in the transferee, that is, at that time, in the Commercial Bank, and not in the plaintiff. It is, therefore, clear that at that time Hiley owed no debt to the company.

It would, therefore, seem to follow that Hiley had no right of set-off at the only relevant date. If the transfer of the mortgage debt had been otherwise than by way of security, the case of *In re Asphaltic Wood Pavement Co.*; *Lee & Chapman's Case* (1) would compel this conclusion. The first question, therefore, becomes a question whether the fact that the transfers to the Federal Building Assurance Co. Ltd. and by that company to the bank were by way of sub-mortgage alters this position.

The case of *In re City Life Assurance Co. Ltd.* (*Grandfield's and Stephenson's Cases*) (2) provides an answer to this question. Policy-holders had mortgaged policies (and in *Stephenson's Case* (3) also land) to the company which had issued the policies. The company went into liquidation. The company repudiated liability under the policies and the policy-holders proved for their resulting claims.

(1) (1885) 30 Ch. D. 216.
(2) (1926) Ch. 191.
(3) (1926) Ch., at p. 196.

H. C. OF A. 1938. HILEY v. PEOPLES PRUDENTIAL ASSURANCE CO. LTD. Latham C.J.

Grandfield's Case (1) dealt with cases in which the company still held the mortgages. It was held that the set-off section applied so that the policy-holder was entitled to set off his claim against the mortgage debt. Hiley would have been in the same position if the plaintiff had not transferred the mortgage to the Federal Building Assurance Co. Ltd.

In *Stephenson's Case* (2) the court dealt with cases where the company had transferred the mortgages by way of sub-mortgage. It was held that in such cases there was no right of set-off. See per *Warrington* L.J. :—"At the date of the winding up the mortgaged debts and the securities for them had been effectually transferred by way of equitable assignment by the company to certain trustees. . . . The result of that was, of course, that at the date of the winding up there was a debt due from the company to the policy-holders . . . but there was no debt due from the policy-holder to the company. . . . Therefore at the date of the winding up there was no mutual credit or mutual debt which could come within the provisions of sec. 31" (the set-off section) "and be set off the one against the other" (3). And: "In the events which have happened, there having been a winding up which has altered the relation of the parties, the right of set-off under the rule applicable in the case of winding up would have applied if it had not been for the assignment, but in face of the assignment, which has destroyed mutuality, it cannot be applied" (4). See also per *Sargant* L.J. :—"For the purpose of applying that doctrine" (that is, of set-off) "you have to find what is in fact the position of the parties at the relevant date—namely, the date of liquidation. If it so happens that at that date there are mutual debts or mutual liabilities deemed to be debts, then those have to be set-off against one another. But I do not see that any person is entitled to be put in the same position as if there were still that mutuality, which has in fact been displaced by the action of the parties" (4).

This case, therefore, shows that Hiley lost his right of set-off when the mortgage was transferred, though by way of sub-mortgage, to the Federal Building Assurance Co. Ltd. Unless this decision

(1) (1926) Ch., at p. 192.
(2) (1926) Ch., at p. 196.
(3) (1926) Ch., at p. 218.
(4) (1926) Ch., at p. 221.

of the Court of Appeal is to be disregarded, I have difficulty in seeing that any other conclusion is possible.

It is put, for the defendant, that the plaintiff company had, at the date of liquidation, a right to redeem the mortgage by paying off the Federal Building Assurance Co. Ltd. and requiring the company to pay off the bank so that the mortgage would again be vested in the plaintiff. This contention is supported by reference to such a case as *In re Moseley Green Coal and Coke Co. Ltd.*; *Ex parte Barrett* [*No.* 2] (1). But in that and similar cases the party seeking to exercise the right of set-off had put himself in the position of being a creditor of the company by exercising rights which he possessed (e.g., as surety for the company) at the time of the liquidation. Such cases illustrate the principle applied in *In re National Benefit Assurance Co. Ltd.* (2)—that it is sufficient to justify a set-off if at the date of the winding up there existed contractual obligations the enforcement of which might give rise to a claim provable in the winding up. In *Barrett's Case* (1) there were such obligations, arising out of the facts that the person claiming the set-off was surety for the company and that, performing his obligations as surety and exercising his rights as surety, he had made himself a creditor of the liquidating company. If, however, being a debtor to that company, he, after liquidation had commenced, had simply bought up rights against the company, he could not have claimed a set-off. The same principle must apply when the company, by its liquidator, obtains rights against a creditor of the company by means of a transaction subsequent to the liquidation and not simply by enforcing rights which existed at the time of liquidation.

This appears to me to be the position in the present case. The plaintiff company at the date of liquidation had no right the enforcement of which could put it in a position to make a money claim against the defendant. The company had no right whatever to sue Hiley on any account. Only the bank could sue Hiley. It is true that the company had a right to redeem the sub-mortgage and so again to become the owner of the mortgage and thus again become the creditor of the defendant. But the company did not exercise this right. If the company was in a position to exercise this right

(1) (1865) 4 De G. J. & S. 756; 46 E.R. 1116. (2) (1924) 2 Ch. 339.

H. C. OF A. 1938. HILEY v. PEOPLES PRUDENTIAL ASSURANCE CO. LTD. Latham C.J.

and had exercised it the position would have been different and such a case as *Barrett's Case* (1) would have justified a conclusion in favour of the right of set-off. What has happened is, in my opinion, something quite different from the exercise of a right which existed in the company at the date of liquidation. The compromise between two of the parties to the action, the plaintiff company and the defendant bank, was an adjustment of their relations *inter se*. It consisted in the sharing between the two parties of certain property belonging to the plaintiff over which the bank had security. The bank took some of the property absolutely and transferred the other property, including Hiley's mortgage, back to the plaintiff. This transaction was a new arrangement between the parties. The plaintiff was not entitled, apart from the new agreement with the bank, to insist upon the transfer of the mortgages. The transaction was simply a distribution of property between the parties to the compromise in settlement of indebtedness. It was a new transaction, depending upon a new agreement with the bank, and it did not depend at all upon the relations between the plaintiff and Hiley or upon any right arising out of those relations.

The rights derived from that transaction are derived solely and entirely from that transaction, and not from any pre-existing rights. That this is so can be demonstrated in the following way :—If the defendant bank, as part of the compromise, had transferred to the plaintiff a mortgage originally given by one John Smith to the bank, then the rights of the plaintiff against John Smith would be precisely the same in legal and equitable character and in origin as the rights of the plaintiff against Hiley. No distinction whatever could be drawn between the two cases. Suppose now that John Smith was, at the time of the liquidation of the plaintiff company, a policy-holder of the company. He would then have the same kind of claim against the company (based upon repudiation of his policy) as Hiley seeks to rely upon to establish the set-off to which he alleges that he is entitled. But it is clear that John Smith would have no right of set-off, though his claim would be the same in all respects as that of Hiley and though his liability to the plaintiff on the mortgage would also be the same in all respects as that of Hiley. It is simply

(1) (1865) 4 De G. J. & S. 756 ; 46 E.R. 1116.

an accident that the plaintiff company has again become entitled to rights against Hiley under the mortgage. The plaintiff company did not so become entitled by reason of any right which it had against Hiley at the time of liquidation. Such rights were acquired, not by exercising any pre-existing right against Hiley, but by virtue of the transfer of the mortgage, to which the plaintiff became entitled solely by reason of a completely new transaction, the agreement for compromise. The making of that agreement did not represent or involve or depend upon the exercise of any rights whatever by the plaintiff. More particularly it did not represent, involve or depend upon, either directly or indirectly, the exercise of any right against Hiley which the plaintiff had at the time of liquidation. The compromise, as a matter of history, arose from the fact that there had been dealings, resulting in debts, between the plaintiff company and the bank. But it did not represent the exercise of any rights by either party. It might, without any surrender or infringement of any rights of the plaintiff, have been made in completely different terms. It might not have dealt with Hiley's mortgage at all. It might have left the bank as the continuing proprietor of the mortgage. It appears to me to be impossible to say that the plaintiff company was entitled, because it had been Hiley's mortgage, to compel the bank to enter into the compromise which happened to result in the plaintiff again becoming Hiley's mortgagee. Thus the present claim of the plaintiff against Hiley did not exist at the time of liquidation, and it did not derive from any right of the plaintiff as against Hiley which existed at that time.

The mortgages were distributed between the parties to the compromise so as to reach an agreed settlement of the indebtedness of the company to the bank. There is no evidence to show whether that indebtedness was discharged in full or only in part. The bank retained mortgages estimated to be worth £8,643. It was an entirely fortuitous circumstance that Hiley's mortgage was among those transferred to the plaintiff instead of among those retained by the bank. If Hiley's mortgage had been included among those retained by the bank it could not have been argued that Hiley now had any right of set-off (*In re City Life Assurance Co. (Grandfield's Case)* (1)). The selection of the date of liquidation as the relevant

(1) (1926) Ch. 191.

H. C. OF A. 1938.

HILEY v. PEOPLES PRUDENTIAL ASSURANCE CO. LTD.

Latham C.J.

date for determining questions of set-off is plainly for the purpose of protecting the rights of creditors of the company in liquidation. It would be strange if the position of creditors of the company were dependent upon the chance allocation of the mortgages between the bank and the plaintiff. Equally it would be strange if one mortgagor received the benefit of a right of set-off because his mortgage happened to be included under the compromise in those transferred to the bank, while another mortgagor was compelled to pay his debt in full because his mortgage happened to be among those retained by the bank.

What has been said really answers the second question above stated—whether what happened after the liquidation had the effect of reviving or reinstating the right of set-off which Hiley formerly had, but which disappeared when the mortgage was transferred by the plaintiff. The re-vesting of the mortgage in the bank, which conferred upon the bank a right to sue Hiley for the sum secured by the mortgage, did not result from any right existing in the company at the time of the liquidation.

The conclusion which I therefore reach is that at the time of liquidation Hiley had no right of set-off and that the right of set-off which he would have had if the liquidation had taken place before his mortgage was transferred by the company to the Federal Building Assurance Co. Ltd. has not been re-established or revived by any subsequent events. I venture to summarize the reasoning by which I have reached the conclusion that the defendant is not entitled to the set-off which he claims. The first three propositions are obvious enough, but I state them for the sake of completeness: (1) There can be no set-off under sec. 82 of the *Bankruptcy Act* unless there have been mutual credits, mutual debts, or other mutual dealings between the parties; (2) If the liquidating company and the creditor of the company seeking to prove have, at the date of liquidation, ascertained money claims against each other arising out of mutual credits, &c., the section applies; (3) The application of the section is not, however, prevented merely by the fact that the claims are not ascertained in amount; (4) But the facts must be such that each party can, by exercising rights existing at the date of liquidation, being rights arising out of mutual credits, &c., put himself in

a position of being entitled to the payment of a sum of money by the other party ; (5) If such rights existed before the date of liquidation, but they have been displaced before that date by the action of one or both parties, the right of set-off is lost ; (6) That right is not reinstated by any further transaction by means of which a party recovers his original rights as existing at the date of liquidation.

In my opinion the judgment of *Nicholas* J. was right and the appeal should be dismissed.

RICH J. It is not disputed that the commencement of the liquidation is the date at which the existence of " mutual credits, mutual debts, or other mutual dealings " must be ascertained for the purposes of set-off. " ' The line is drawn at the time of the bankruptcy, and the rights of the parties are not to be altered by subsequent transactions. A person comes in to prove a debt against the bankrupt's estate ; if there are mutual credits between the bankrupt and the creditor, then an account is to be taken, and the balance is to be proved against the estate, or paid to the estate, as the case may be.' The answer to this argument is that the appellants are not seeking to alter the rights of the parties by reference to subsequent transactions, but are seeking to ascertain them by reference to the natural outcome of previous transactions, and Lord *Selborne's* observations, so far from supporting the respondent's contention, seem to me to show that the account which the section of the Act directed should be taken is to be taken when the claim on the one side or the other is presented " (*In re Daintrey* ; *Ex parte Mant* (1)). The date of the commencement of the liquidation corresponds with the date of the sequestration order in bankruptcy. But this statement does not mean that at the time when the winding up commences there must exist claims which then and there can be made the subject of account and set-off (*In re Daintrey* ; *Ex parte Mant* (2)). Rights must be vested in the creditor and in the company which, without any new transaction, grow in the natural course of events into money claims capable of forming items in an account or capable of settlement by set-off. The problem in the present case arises from the fact that at the time when the liquidation commenced

(1) (1900) 1 Q.B., at p. 568. (2) (1900) 1 Q.B., at pp. 571, 574.

H. C. OF A. 1938.

HILEY v. PEOPLES PRUDENTIAL ASSURANCE CO. LTD.

Rich J.

the company's rights in respect of the appellant's mortgage debt were the subject of an outstanding dealing or dealings with third parties. If these dealings had not taken place the appellant's claim for damages for loss of the insurance on his life by reason of the repudiation by the liquidator of his life policy would clearly be a mutual dealing with his liability for the moneys borrowed on the security of his land and his life policy. The difficulty consists entirely in the fact that before the liquidation began the company had transferred the mortgage by way of security and the transferee had again transferred it by way of security, this time to the Commercial Bank. After the liquidation the liquidator acquired the mortgage for the company, which the company then possessed as of its former estate. This was accomplished by the liquidator by putting forward a claim suggested to him by a contention raised by the appellant on moratorium proceedings by the bank, that the transfer by the company of the mortgage in question together with a great number of other mortgages was *ultra vires*, and the subsequent transfer to the Commercial Bank by the transferee, also a company, was *ultra vires* of that company. The rights and wrongs of the liquidator's claim do not appear to concern us. Either it or some other features of the transaction were found sufficiently impressive to lead the bank to enter into a compromise with the appellant by which each took the absolute property in half the mortgages, the appellant's mortgage falling to the lot of the liquidator. The result was that in the winding up the company became entitled once again to a claim against the appellant which, apart from the effect of the transfers, would have formed a mutual dealing with the appellant's claim on the life policy. The mortgage has not so far been actually retransferred by registered transfer, but the bank has agreed to give one, and as mutual credits, debts and dealings are determined according to equitable rights the absence of a formal transfer is not material one way or the other. It is hardly necessary to say that while the mortgage was in the hands of the bank the appellant could not rely on the statutory set-off as against the bank. It would be necessary for him to make out some special equity and that the bank had notice before the bank's rights to the mortgage moneys could be affected by the appellant's claim on the life policy.

But I cannot see that it follows that the liquidator when he resumed on behalf of the company his former beneficial interest in the mortgage takes it with all the bank's freedom from set-off. The liquidator must be regarded as having asserted with success claims vested in the company at the time when the liquidation began. The present absolute right of the company to the mortgage arose out of such claims, and is the outcome of a right belonging to the company at that time, a right which has materialized in a debt presently owing by the appellant to the company. The company had an equity of redemption in the mortgage and a claim to set aside the transfers by way of sub-mortgage. To this extent the appellant was indirectly liable to the company. One part of the decision in *Lee & Chapman's Case* (1) is that, so far as a balance might arise in the hands of a mortgagor or chargor, it is liable to set-off. As I view the matter, without any new transaction, i.e., without any original acquisition of the mortgage debt, the liquidator has managed to get rid of the entire encumbrance upon the mortgage and to reduce the mortgage into the possession of the company. I think it must come back subject to the claim of the appellant to set off the company's liability to him upon the policy as a mutual dealing. The case of *In re City Life Assurance Co. Ltd.* (2), although no doubt somewhat confusing, does not appear to have anything to do with the question whether the existence at the time of liquidation of an encumbrance or other dealing in favour of third parties upon or with a debt or chose in action in respect of which the set-off is sought operates to defeat the set-off in favour of the company when that encumbrance has been cleared off after the commencement of the winding up or that dealing has been got in or nullified. On the other hand, it clearly approves of *Lee & Chapman's Case* (1), which decided two points, one of which is directly material to the present case and, as I think, ought to control its decision.

In my opinion the appeal should be allowed.

STARKE J. Appeal from a decretal order of *Nicholas* J. declaring that a memorandum of mortgage dated 24th November 1927 from the appellant to the respondent, the People's Prudential Assurance

(1) (1885) 30 Ch. D. 216. (2) (1926) Ch. 191.

H. C. OF A. 1938.

HILEY v. PEOPLES PRUDENTIAL ASSURANCE CO. LTD.

Starke J.

Co. Ltd. (in liquidation) (hereinafter called the "assurance company") was a valid and subsisting mortgage and that the appellant was not entitled to set off the amount secured by the mortgage against the damage suffered by him by reason of the repudiation by the assurance company of its liabilities under a policy of life assurance which it had effected on the life of the appellant.

The facts are fully stated in the opinion of the Chief Justice and need not be repeated. On 14th April 1930 the Supreme Court of New South Wales ordered that the assurance company be wound up. The appellant bases his right to set-off upon what is known as the "mutual credits, mutual debts or other mutual dealings" clause to be found in the Commonwealth *Bankruptcy Act*, sec. 82, and applied to companies being wound up in New South Wales by the *Companies Act* 1899 (N.S.W.), sec. 264. Under this clause "the characteristic of mutuality must always be present" (*In re City Life Assurance Co. Ltd.* (1); *In re Mid-Kent Fruit Factory* (2)). And the dealings on each side must be such as "would end in a money claim" (*Eberle's Hotels and Restaurant Co.* v. *Jonas* (3)). Further, all claims provable in bankruptcy or in a winding up may be set off provided there be mutuality (*In re Mid-Kent Fruit Factory* (4); *Williams* on *Bankruptcy*, 13th ed. (1925), p. 171). And the date of the liquidation is the proper date for ascertaining what mutual debts credits or dealings exist capable of being set off (*In re Daintrey*; *Ex parte Mant* (5); *In re City Life Assurance Co. Ltd.* (6)).

It was not denied that the amount payable by way of damages in respect of the repudiation by the assurance company of the policy issued by it might have been set off against the amount due by the appellant on his mortgage had not the mortgage before the date of the liquidation been transferred by the assurance company to the Federal Building Assurance Co. Ltd. (in liquidation) and again by that company to the Commercial Bank of Australia (*Lee & Chapman's Case* (7); *In re City Life Assurance Co. Ltd.* (6)). At

(1) (1926) Ch., at p. 216; 95 L.J. Ch. 65; 134 L.T. 207; 42 T.L.R. 45.
(2) (1896) 1 Ch. 567, at p. 571.
(3) (1887) 18 Q.B.D. 459, at p. 465.
(4) (1896) 1 Ch. 567.
(5) (1900) 1 Q.B. 546.
(6) (1926) Ch. 191.
(7) (1885) 30 Ch. D. 216.

the date of the winding up the assurance company was liable upon its policy to the appellant, but upon the authority of the last-named case (1) it is said that there was no debt due from the appellant to the assurance company at law or in equity, because the debt which had been due from the appellant to the assurance company was effectually transferred to the bank, and the mutuality required by that section did not exist. The result, if established, is hard upon the appellant and strikes me, in the circumstances of this case, as unjust. There are cases in the books in which sureties who have been compelled to pay a principal debt after bankruptcy have been allowed to set off the sum so paid against debts due to the bankrupt (Cf. *Rowlatt* on *Principal and Surety*, 2nd ed. (1926), p. 307). But the obligation of the surety in those cases arose before bankruptcy and was an obligation which might and did in fact end in a money claim.

In the present case the obligation of the appellant arose before the winding up but, if the transfer of his mortgage was valid, that obligation had been effectually assigned by way of sub-mortgage. It is contended that mutuality between the appellant and the assurance company was thus destroyed. It is claimed that the case of *In re City Life Assurance Co.* (*Stephenson's Case*) (1) is precisely in point. But though the assignment in that case is referred to in some of the reports as a sub-mortgage I doubt whether it was so. It seems to have been an assignment to trustees for the benefit of certificate and policy-holders. However that may be, the assurance company in the present case always retained an equity to have the plaintiff's mortgage retransferred to it on payment of what was due to the transferees. But the decisive distinction is that the assurance company challenged in earlier stages of this suit the validity of various transfers of mortgage including the transfer of the mortgage given to it by the appellant.

In June 1936 a compromise was effected in these proceedings and one of the terms of settlement was that the appellant's mortgage should be retransferred to the assurance company. On 12th October 1936 the Chief Judge in Equity approved of the compromise and it was carried into effect. In my opinion this compromise did not

(1) (1926) Ch. 191.

H. C. OF A. 1938. HILEY v. PEOPLES PRUDENTIAL ASSURANCE CO. LTD. Starke J.

confer any new right on the assurance company but in effect established its title to the appellant's mortgage as against the transferees and remitted it to its position as if the transfers had not been made. In substance, if not in form, the compromise established that the assurance company was always entitled in equity to the benefit of the mortgage given to it by the appellant and to the debt secured by it. Accordingly, the characteristic of mutuality was always present as between the appellant and the assurance company. It is for this reason that I think the appeal should be allowed and the appellant declared entitled to set off his claim for damages under the life policy against his liability under the mortgage given by him to the assurance company.

DIXON J. The active life of the respondent company was brought to an end on 14th April 1930 by an order for compulsory winding up. Among its contingent creditors were a number of persons holding policies of life insurance for which they had been induced to propose by the attractions of what the company called its House Property Purchase System.

The appellant, Hiley, is the holder of such a policy who availed himself of the supposed advantages of the plan. In 1923 he effected an insurance with the company upon his life for £1,000. The policy was indorsed with particulars of the company's system. Four years later, on 24th November 1927, in accordance with the indorsements, he borrowed the amount of the face value of the policy from the company upon the security of a registered mortgage of the land of which he was the purchaser, together with a memorandum of deposit of the life policy. By an instrument bearing the same date the company undertook that, so long as Hiley should punctually pay the premiums on the policy and also punctually pay the interest as mentioned in the mortgage, the company would not call upon him to repay the principal until the policy matured or the moneys thereby assured became payable.

Up to the commencement of the liquidation Hiley in fact paid the interest on the mortgage and the premiums regularly but never punctually *ad diem*. He paid the interest within a maximum of sixteen days of its due date, but the last premium was more than

three months overdue when it was paid. The company accepted all the payments and did not in fact attempt to call up the mortgage moneys before the winding-up order, at which date no interest or premium was overdue.

It is a question upon these facts whether the company was at that time bound to allow the principal sum secured by the mortgage to remain outstanding until the policy matured or some further default in payment of interest or premiums occurred (See *Re Taaffe's Estate* (1); *Keene* v. *Biscoe* (2); *Seal* v. *Gimson* (3)). But upon this question I do not find it necessary to enter.

On 31st July 1929, that is, about nine months before the commencement of the winding up, the company transferred the mortgage given by Hiley to another company, called the Federal Building Assurance Co. Ltd. This transfer, although absolute in form, was in fact given by way of security. The sum intended to be secured does not appear. The transfer was not registered until 29th January 1930 and on 6th February 1930 the transferee company in turn transferred the mortgage to a bank. This transfer also was by way of security, though again in form absolute.

Possibly from the indorsements upon the policy and from the memorandum of 24th November 1927 Hiley might be able to spell out an implication that upon his policy maturing the policy moneys would be applied in extinguishment of the mortgage debt and, if so, perhaps he might have complained of the transfer of the mortgage as dividing the policy from the mortgage. But, again, I think that it is unnecessary to pursue this question.

The making of the winding-up order would, I imagine, operate as a renunciation of the company's liability upon the policy of insurance, but the liquidator under the authority of the court afterwards expressly repudiated the obligation of all life policies, thus giving rise to a provable claim for unliquidated damages.

The question which has arisen is whether this claim and the mortgage debt should be set off against one another as mutual credits or dealings. The question entirely concerns the cross-liabilities of the company and Hiley. For, since the commencement

(1) (1864) 14 I. Ch. R. 347. (2) (1878) 8 Ch. D. 201.
(3) (1914) 110 L.T. 583.

H. C OF A. 1938.

HILEY v. PEOPLES PRUDENTIAL ASSURANCE CO. LTD.

DIXON J.

of the liquidation, the company has obtained the entire beneficial property in the mortgage. Under an agreement of compromise made on 3rd June 1936 it obtained an immediate right against the bank to a transfer to it of the mortgage. The compromise was made between the company, the bank and the Federal Building Assurance Co. Ltd., which is also in liquidation. The claims or disputes compromised arose as follows:—In or about September 1933, the bank, as registered proprietor of the mortgage given by Hiley, took proceedings against him under the *Moratorium Act* for the purpose of obtaining leave to pursue its remedies under the mortgage. In these proceedings Hiley set up the company's repudiation of the policy of insurance as a matter affecting the bank and disentitling it to the benefit of the mortgage. He also objected that the transfers of the mortgage by the respondent and the Federal Building Assurance Co. Ltd. were each void on the ground of *ultra vires* and voidable for fraud of which he alleged that the bank had notice. The moratorium proceedings were adjourned to enable the parties to obtain a determination of the questions thus raised.

On 1st November 1933, the liquidator of the respondent company began a suit in which that company was plaintiff and Hiley and the bank and the Federal Building Assurance Co. Ltd. were joined as defendants. It is out of this suit in a changed form that the present appeal arises. Under an order of 29th November 1935 the statement of claim was amended. The relief claimed by the respondent company included declarations that the transfer by it to the Federal Building Assurance Co. Ltd. and the transfer by that company to the bank were void and that the bank held the mortgage in trust for the respondent company and a declaration that the mortgage was valid against Hiley and that the respondent company was, subject to the *Moratorium Act*, entitled to enforce it against him. Apparently other mortgages had been dealt with in much the same way as Hiley's mortgage and, including the latter's mortgage, some twenty-nine mortgages securing principal sums amounting to £17,290 were affected. A compromise of the matter was made between the parties, other than Hiley, by which they agreed to divide the mortgages equally between them. The bank agreed to transfer to the respondent company certain of the mortgages, securing

principal sums amounting to £8,647, and to retain as its absolute property the rest of the mortgages, amounting to £8,643. Those to be transferred included Hiley's mortgage. Under the compromise the suit was to proceed as against him. Accordingly, under an order dated 19th August 1937, the statement of claim was further amended with a view to obtaining relief only against Hiley. The suit in this form came on to be heard before *Nicholas* J., who declared that the mortgage is valid and subsisting and that the respondent company is entitled to the benefit thereof and, subject to the *Moratorium Act*, to enforce payment of the mortgage moneys, and that Hiley has no right to set off against the amount secured the damage suffered by him by the repudiation of the life policy.

It is, of course, clear that the respondent company's title to these declarations must depend upon the state of facts existing at the date of the institution of the suit and cannot rest upon the compromise of 3rd June 1936, although, of course, Hiley may rely upon that compromise by way of defence, if it affords or contributes to a defence.

The ground upon which a right to set off the company's liability under the policy of insurance against the mortgage debt is denied to Hiley is that at the time of the commencement of the winding up the mortgage was vested in the bank. As the mortgage was vested in the bank the mortgage debt was owing by Hiley to the bank and not to the respondent company and so the liability of the company upon the policy and the mortgage debt could not, it is said, constitute mutual credits or dealings.

Sec. 264 of the *Companies Act* 1899 (N.S.W.) operates to make the provisions of the bankruptcy law now contained in sec. 82 of the *Bankruptcy Act* 1924-1933 of the Commonwealth applicable to the winding up of companies. The result is to require that, where there have been mutual credits, mutual debits or other mutual dealings between an insolvent company in liquidation and any person proving or claiming to prove a debt in the winding up, an account should be taken of what is due from the one party to the other and the sum due from the one party should be set off against the sum due from the other. It is well settled that for the purpose of ascertaining whether there are mutual debts, mutual credits or

H. C. OF A. 1938. HILEY v. PEOPLES PRUDENTIAL ASSURANCE CO. LTD. Dixon J.

other mutual dealings the decisive date is that of the commencement of the winding up. At that date the assets of the company, including the choses of actions or claims of the company, become a fund in the hands of a liquidator, and the liabilities of the company are converted into claims upon that fund. The rights and liabilities of the persons liable to contribute to the fund and of those entitled to share in its distribution are to be ascertained as at that time. In the course of administering the assets, the liquidator may find it necessary to create new claims upon the fund which thus may chance to be depleted. But liabilities incurred by the liquidator on behalf of the company are of a different order and they in no way disturb the mode or proportion in which the claims of the creditors existing at the date of liquidation share in the assets remaining available to answer their claims. In the same way, the acquisition by the liquidator on behalf of the company of new claims against others cannot vary the rights of creditors antecedently existing. If a liquidator in the course of the winding up sells assets of the company to a purchaser, who happens also to be a proving creditor, the purchaser cannot set off the purchase price against the debt for which he is entitled to prove.

If the liquidator in the present case be regarded as having acquired on behalf of the respondent company a new right to Hiley's mortgage not subsisting in the company at the commencement of the winding up, then it is easy to understand why the company's liability on Hiley's life policy should not be set off against Hiley's liability for the mortgage moneys which the company would thus have acquired after the commencement and in the course of the liquidation. As against the bank, assuming it to have been a bona fide transferee of the mortgage for value, Hiley could claim no such set off. If the liquidator on behalf of the company simply obtains the bank's rights in the course of liquidation and stands in the bank's shoes, no right of set off arises, because the credits are not mutual at the commencement of the winding up. But, in my opinion, the foundation of this reasoning is incomplete and the conclusion is unsound. It leaves out of account more than one consideration. In the first place, the general rule does not require that at the moment when the winding up commences there shall be two enforceable debts, a

debt provable in the liquidation and a debt enforceable by the liquidator against the creditor claiming to prove. It is enough that at the commencement of the winding up mutual dealings exist which involve rights and obligations whether absolute or contingent of such a nature that afterwards in the events that happen they mature or develop into pecuniary demands capable of set off. If the end contemplated by the transaction is a claim sounding in money so that, in the phrase employed in the cases, it is commensurable with the cross-demand, no more is required than that at the commencement of the winding up liabilities shall have been contracted by the company and the other party respectively from which cross money claims accrue during the course of the winding up (*Naoroji* v. *Chartered Bank of India* (1); *Astley* v. *Gurney* (2); *Palmer* v. *Day & Sons* (3); *In re Daintrey*; *Ex parte Mant* (4)).

In the second place, the equitable or beneficial interest of the parties in the mutual debts, credits or dealings must be considered and not merely the dry legal right. A set-off will be allowed between a debt owing by C to a liquidating company and a debt owing by it to B, if B as creditor holds the chose in action as bare trustee for C. Correspondingly, a set-off will be refused between a debt owing by B to a liquidating company and a debt owing by it to B, if B as creditor hold the chose in action as bare trustee for C (Cf. *Bailey* v. *Finch* (5); *Bailey* v. *Johnson* (6); *Ex parte Morier*; *In re Willis, Percival & Co.* (7); *Mathieson's Trustee* v. *Burrup, Mathieson & Co.* (8)).

In the third place, it is settled that if a creditor of a liquidating company, that is, the person entitled to a legal chose in action, has before the winding up assigned it equitably to a third party by way of charge as security for a debt owing by him to the third party but of smaller amount so that there is a residue to be paid over to the assignor, the liquidating company may set off against the residue a cross-demand upon the creditor. This is settled by *Lee & Chapman's Case* (9), where the Court of Appeal decided that under an

(1) (1868) L.R. 3 C.P. 444, at pp. 451, 452.
(2) (1869) L.R. 4 C.P. 714.
(3) (1895) 2 Q.B. 618, at p. 622.
(4) (1900) 1 Q.B., at pp. 568, 574.
(5) (1871) L.R. 7 Q.B. 34.
(6) (1871) L.R. 6 Ex. 279; (1872) L.R. 7 Ex. 263.
(7) (1879) 12 Ch. D. 491, at p. 496.
(8) (1927) 1 Ch. 562, at pp. 568, 569.
(9) (1884) 26 Ch. D. 624, at pp. 627, 629; (1885) 30 Ch. D., at p. 222.

H. C. OF A. 1938. HILEY v. PEOPLES PRUDENTIAL ASSURANCE CO. LTD. Dixon J.

engineering construction contract, partly performed before the commencement of the winding up and completed by the liquidator, a sum of £3,820 to which the company became entitled on completion was subject first to a charge in favour of third parties for £1,900 and, as to the balance, to a set-off in favour of the opposite contracting party for unliquidated damages in respect of future obligations of the company, turned into rights of proof by the winding up. It was also decided that the claim of the third parties in respect of the £1,900 was not subject to the set-off.

In the fourth place, secured debts or liabilities are no less the subject of set-off than unsecured debts as mutual debts, credits or dealings. To the extent that the secured debt is answered by set-off the security is freed (See *Ex parte Barnett*; *In re Deveze* (1); *Ex parte Law*; *Re Kennedy* (2)).

In the present case, at the commencement of the winding up the respondent company no longer had the unencumbered ownership of the mortgage debt owing by Hiley. But it was at least entitled to an equity of redemption in that debt, which, under the registration system, was vested at law in the bank. This means that in equity the company was considered owner of Hiley's mortgage debt, subject, however, to the debt or liability for which the bank held it as security and any further amount for which the Federal Building Assurance Co. Ltd. was entitled to hold the mortgage as security. Moreover, there existed a claim to set aside or treat as void or voidable the transfers of the mortgage from the respondent company to the Federal Building Assurance Co. Ltd. and from the latter company to the bank. This claim had not been propounded at the time but all the elements upon which it was afterwards based existed at the time when the winding up commenced. When it was propounded by the liquidator by filing the statement of claim in the suit, the claim was disputed; but in settlement of the claim all the mortgages were divided between the respondent company and the bank and only thus did the respondent company become entitled to the unencumbered property in Hiley's mortgage, including the mortgage debt against which Hiley seeks to set off the company's liability under the life policy. There is, of course, no doubt that, as against

(1) (1874) 9 Ch. App. 293. (2) (1846) De G. 378; 8 L.T. (O.S.) 236.

the bank, Hiley would not have been entitled to set off the respondent company's liability under the policy. There is, I think, equally no doubt that if the bank had enforced the mortgage against Hiley and the mortgage debt proved more than sufficient to clear off the liabilities to the bank and to the Federal Building Assurance Co. Ltd. secured over Hiley's mortgage, so that a residue was payable to the respondent company, then, in that case, Hiley would have been entitled in the liquidation to obtain the benefit of this residue by means of set-off. This appears to me to be so on principle and also to result from the decision in *Lee & Chapman's Case* (1). This right of set-off would arise from what I think no one would deny, namely, that the giving of the mortgage by Hiley and the undertaking by the company of the liability upon his life were mutual dealings.

The question in the case is, in my opinion, whether when in virtue of rights or claims subsisting at the commencement of the winding up, the liquidator gets in the interest antecedently transferred by the company, that is, accordingly as it may be regarded, when he clears off the encumbrance or substantiates in part by way of compromise the disputed claim that the transfer was invalid, the interest so got in becomes subject to the rights of set-off to which it must have been subject, had it been continuously vested in the company.

In my opinion the answer is that the entire amount of the mortgage becomes subject to the statutory right of set-off. All the respondent company's rights in relation to the mortgage arise out of and are referable to rights subsisting at the time when the winding up began. It pursued or prosecuted whatever rights then belonged to it with the result that it obtained a right to call for an unencumbered legal title to the mortgage to which, unless the transfers or one of them were in truth invalid, it was entitled, on liquidation, only in equity subject to encumbrances. But this was the consequence of pursuing rights subsisting at that time and involved no new and independent transaction. Standing as the liquidator did upon claims forming part of the assets he was appointed to administer, he cannot assert a fresh and independent title to the asset got in so as to free it from

(1) (1885) 30 Ch. D. 216.

H. C. OF A. 1938.

HILEY v. PEOPLES PRUDENTIAL ASSURANCE CO. LTD.

Dixon J.

the disability or disadvantage of set-off to which, if it formed part of those assets, it must be subject. In point of authority I think that the decision of Lord *Westbury* in *In re Moseley Green Coal and Coke Co. Ltd.*; *Ex parte Barrett* [*No.* 2] (1) justifies, if it does not require, this conclusion. There Barrett was a surety for a mortgage debt of a company for which the mortgagee also took the company's promissory note. After the commencement of the winding up he took a transfer to himself of the mortgage securities and promissory note on discharging his liability as surety. He was himself liable as a contributory to the company and he sought to set off the company's indebtedness which had thus been transferred to him against his liability. No point was made of the fact that his liability was that of a contributory; possibly the explanation is that his liability as a shareholder was unlimited, although I should infer that the company was registered with limited liability under the Act of 1856. Lord *Westbury* said: "Then the question comes to this: if an individual be surety for a creditor of a company anterior to a winding-up order, and afterwards, in respect of that suretyship, pays the debt, and becomes entitled to the benefit of the securities, among which is a promissory note, is he or is he not, in respect of the ownership of that promissory note, entitled to set it off against any claim which the company may have against him? I think he must be held to be precisely in the same state in which the creditor stood at the time when the note was made; and if I remit him back to the right which his principal had, then I refer his right to set-off to the state of things which existed at the time of the winding-up order; and not to a state of things which has arisen in consequence of any contract or proceeding which has taken place subsequently to the winding-up order" (2). After giving counsel a further opportunity of examining the authorities, Lord *Westbury*, on a later day, said: "Then comes the mischievous thing, in winding up as in bankruptcy, of permitting a debtor to purchase up counterclaims subsequently to the winding-up order for the purpose of making a case of set-off; and then, whether there is not an exception in the case when there is an actual ownership of a

(1) (1865) 12 L.T. (N.S.) 193; 4 De G. J. & S. 756; 46 E.R. 1116.
(2) (1865) 12 L.T. (N.S.), at p. 194.

counterclaim, which, though arising subsequently to the winding-up order or the bankruptcy, yet is a consequence of some anterior matter. And then comes the material question in the present case : Does the contract of suretyship, incurred as it was by Barrett anterior to the winding-up order, with its attendant rights, give such retrospective force to Barrett's possession and ownership of the note as to enable him to refer it back to that contract or relation, before the winding-up order was made ? My present impression is that it will ; that he is a bona fide possessor of the note, and therefore that he has a right to a set-off" (1). Having taken further time to consider the question, his Lordship adhered to the opinion he had expressed and made an order for set-off.

The conclusion is supported also by a line of authorities relating to bills of exchange, of which *Collins* v. *Jones* (2) may be taken as an example. In these cases the indorser of a bill of exchange accepted by a person afterwards becoming bankrupt has been allowed to set off the bankrupt's liability on the bill against a debt owing by him to the bankrupt, although at the time of the bankruptcy the bill was in the hands of a subsequent indorsee as holder and was afterwards obtained by the indorser seeking to use it by way of set-off, only by paying off the holder (See, too, *Bolland* v. *Nash* (3)). Thus, in *McKinnon* v. *Armstrong Brothers & Co.* (4) Lord *Blackburn* says : " It has for many years been decided, both in England and in Scotland, that if the indorser became a party to the bill before the bankruptcy in the one country or the sequestration in the other, he may set it off on becoming holder afterwards."

For these reasons I am of opinion that Hiley is entitled to set off the respondent company's liability under the life policy against his liability to the company in respect of the mortgage debt.

Nicholas J. arrived at the opposite conclusion, being led thereto chiefly by the decision of the Court of Appeal in *In re City Life Assurance Co. Ltd.* (*Stephenson's Case*) (5). A clear understanding of this decision is difficult to obtain because of the very inadequate statement of the facts contained in the various reports of the case.

(1) (1865) 12 L.T. (N.S.), at p. 195.
(2) (1830) 10 B. & C. 777 ; 109 E.R. 638.
(3) (1828) 8 B. & C. 105 ; 108 E.R. 982.
(4) (1877) 2 App. Cas. 531, at p. 539.
(5) (1926) Ch., at p. 214 ; 134 L.T. 207 ; 42 T.L.R. 45.

H. C. OF A. 1938.

HILEY v. PEOPLES PRUDENTIAL ASSURANCE CO. LTD.

Dixon J.

But from a perusal of the reports I have mentioned I gather that the essential facts were these. The company had carried on, possibly at different times, two systems or schemes for lending or providing money for the purchase of homes or other property. Under one, its clients paid a monthly subscription recorded on a savings certificate until the company held a sufficient margin to cover any deficiency in a proposed security. Then on the security of the home or other property he was purchasing the client borrowed from the company enough to enable him to pay off the purchase money. The company thus became contingently liable to the client in respect of the contributions made by him in order to provide the margin. The other system or scheme was to grant insurances upon the life of the client and then, after payment of a certain number of premiums, to lend him the required sum on the security of a mortgage of the land purchased by him and of his life policy. In order to secure the repayment of the sums for which the company might be liable under the first scheme, particularly in the case of contributors who had not as yet obtained or did not in the result obtain a loan, and perhaps also to secure some of the liability to clients under the second scheme, the company constituted certain persons trustees to whom the contributions were to be confided. In fact, for reasons of its own, the company made equitable assignments to the trustees of the mortgages given by clients borrowing under the second scheme and also equitable assignments of the securities taken over those clients' life policies. Then the company went into liquidation and, of course, the life insurance policies were turned into rights of proof on the part of the policy-holders. The policy-holders who had borrowed fell into two classes. The securities given by some policy-holders, both mortgages of land and life policies, had not been assigned to the trustees; these policy-holders formed one class. The securities given by other policy-holders had been so assigned; they formed the second class. The Court of Appeal decided that the former class was entitled to set off in the winding up their claims under the life policies which had been repudiated against their liability for the mortgage debts. This right of set-off would scarcely have been disputed, I imagine, had it not been for a previous decision, *Ex parte Price*; *In re Lankester* (1), which, however, the Court of Appeal declined to follow. The latter class of policy-holders were held disentitled to any set-off because of the assignment of their

(1) (1875) 10 Ch. App. 648.

mortgage debts to the trustees. Clearly no set-off could have been available to them if the mortgages had been the subject of legal assignments to the trustees for value and without notice of the mortgagors' claims to have the mortgage moneys answered out of the policy moneys. But the assignment to the trustees was equitable only and the mortgagors had received no notice thereof. Thus the legal right to recover the mortgage moneys, the debt, and the legal right to enforce the security were vested in the liquidating company. Accordingly there were cross-demands between the policy-holders as proving creditors and the company, in the winding up of which they would prove. The argument was that under the rule in bankruptcy the antecedent equitable assignment without notice could not intercept the right of set-off resulting from the situation. The distinction was rested on the absence of notice. It will be seen that the question at issue was not of the same description as that upon which the present case turns and depended upon quite different principles. In the *City Life Assurance Co.'s Case* (1), if equities were ignored and legal titles only were considered, there would be two mutual debits and credits resulting in a set-off between proving creditor and liquidating company. But on it appearing that the equitable interest of the liquidating company in its credit or claim was the subject of an outstanding assignment, although an assignment of which no notice had been given, the question arose whether, in the absence of notice, the set-off should be maintained, notwithstanding that it would defeat or impair the equitable interest of the assignee. The argument was that the set-off prevailed because of the want of notice to the mortgagors, that is, to the debtors, who, on the cross-demand, were proving creditors. The Court of Appeal decided against this argument, and the reason is expressed in two sentences of *Warrington* L.J. :—" In my opinion that distinction is immaterial. The argument founded upon it rests on what is with all respect, in my opinion, a misapprehension of the effect of notice in questions of equitable assignment. The equitable assignment itself is absolute and complete whether notice is given or not " (2). This reason is also given by *Sargant* L.J. (3). But, though *Pollock* M.R. propounds the question in the same way, namely, whether the decision in favour of allowing a set-off " can be extended so as to include the case of policy-holders and mortgagors whose mortgages

(1) (1926) Ch. 191.

(2) (1926) Ch., at p. 219, 220.

(3) (1926) Ch., at p. 221.

H. C. OF A. 1938. HILEY v. PEOPLES PRUDENTIAL ASSURANCE CO. LTD. Dixon J.

were equitably assigned to the trustees of the trust deed antecedent to the winding up" (1), yet when he proceeds to give his reasons for a negative answer, he speaks throughout of assignments of the policies, not of the mortgages. Possibly his Lordship considered that the policy-holders could not rely upon the liability of the company to them under their policies because they had given a security over them to the company for their mortgage debts and that security had been assigned to the trustees. If this be the explanation, however, the point made has even less bearing on the present case. But more probably the substitution of references to the assignments of the policies for references to the assignments of the mortgages is nothing but a slip. The decision that the equitable assignments even without notice operated to prevent a set-off means, of course, that equitable or beneficial interests, as opposed to purely legal interests, are to be regarded and this tends to support, rather than to detract from, the conclusion which I have adopted. But there is one point which, owing to the meagre report of the facts, may appear to present a difficulty. It would seem to be fairly clear that the equitable assignment of the mortgages to the trustees was by way of security and, indeed, at various places in the reports the assignment is described as a sub-mortgage. If there was any prospect of a residue remaining after realization of the security and payment of the amount of the encumbrance, then as against the company as distinguished from the trustees the policy-holders would have been entitled to set off their claims against that residue. This would be the result of so much of the decision in *Lee & Chapman's Case* (2) as relates to the residue of the debt there assigned or charged remaining after the deduction of the £1,900 secured by the assignment or charge. But I think that it is evident that there could have been no prospect of a balance or residue in favour of the City Life Assurance Co. after the claims of the trustees were satisfied. For *Warrington* L.J. refers to *Lee & Chapman's Case* (2) for the decision that, as against the assignees or chargees, there could be no set-off. He said: "It was recognized in argument that that decision in *Lee & Chapman's Case* (2) would be conclusive against the appellants but for one circumstance of distinction, and that was that in *Lee & Chapman's Case* (2) a notice of the assignment in favour of Lee & Chapman had been given to the Commissioners

(1) (1926) Ch., at p. 215. (2) (1885) 30 Ch. D. 216.

the day before the winding up, and that in this case no notice of the assignment had been given at all" (1).

Further, neither counsel nor judges refer anywhere to the possibility of a residue. The decision appears to me to relate only to the position as between the policy-holders and the trustees as equitable assignees beneficially entitled to the mortgage debts the legal title to which remained vested in the liquidating company. It does not, in my opinion, affect the special question upon which the present case turns, which could only have arisen in the *City Life Assurance Co.'s Case* (2) if that company either had obtained the rescission or avoidance of the assignment to the trustees or had redeemed the mortgages so assigned. I think that if that had been done there is nothing contained in the decision or in the observations made in the Court of Appeal to suggest that their Lordships would or might have thought that the mortgages did not resume the position they, otherwise, occupied and become again subject to the set-off in favour of the policy-holders.

In my opinion the present appeal should be allowed, the decree against Hiley should be discharged; the cross-relief prayed by par. *f* of his amended defence should be granted and otherwise the suit should be dismissed as against him. The plaintiff company should pay his costs of the suit and of this appeal.

Appeal allowed with costs. Decree of Supreme Court discharged. Declare under the prayer of the defendant Hiley for cross-relief that he is entitled to set-off against any amount claimed by or for the benefit of the plaintiff company under the mortgage dated 24th November 1927 *referred to in the re-amended statement of claim herein the damage suffered by him by reason of the repudiation by the plaintiff company of its obligations under the policy of insurance number* 024407 *referred to in the said statement of claim. Plaintiff company to pay the defendant Hiley's costs of suit up to and including this decree upon the basis that the re-amended statement of*

(1) (1926) Ch., at p. 219. (2) (1926) Ch. 191.

H. C. OF A. 1938. HILEY v. PEOPLES PRUDENTIAL ASSURANCE CO. LTD.

claim was the commencement of the suit. Last-mentioned order for costs not to affect orders (to be specified in the formal order as passed) for the payment of costs made in the suit before the date of decree appealed from. Costs payable by the defendant Hiley to be set off against costs payable to him. Official liquidator of the plaintiff company to pay out of plaintiff company's assets to A. E. Campbell the official liquidator of the defendant the Federal Building Assurance Co. Ltd. the costs as between solicitor and client of this suit of the Federal Building Assurance Co. Ltd. and of its official liquidator. Remit cause to the Supreme Court.

Solicitors for the appellant, *H. O. Marshall, Lupton & Scott.*

Solicitors for the respondent, The Peoples Prudential Assurance Co. Ltd. (in liquidation), *Perkins, Stevenson & Co.*

J. B.