

cipal election, and I do think that it should do so in the case of an election of office bearers in an association or union of this kind. Under the common law relating to parliamentary and municipal elections the Court will not interfere and declare an election void unless it is made to appear that something wrong or improper has taken place which has so affected the proceedings or which at least may probably have so affected them that the voters have not had a free and fair opportunity of electing the candidate whom the majority prefer: *Woodward v. Sarsons* (L.R. 10 C.P. 733); *Bridge v. Bowen* (21 C.L.R. 582). On the facts alleged and seeing that the result of the voting has not yet been announced, the Court cannot be satisfied that anything of this kind has taken place.

When the votes are counted it may appear that the results are so decisive that they could not have been affected by the improper acts complained of.

I think, therefore, that on this ground also the statement of claim discloses no case for relief, and the demurrer must therefore be allowed with costs.

Solicitors: *A. C. Roberts; H. E. Hoare.*

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*Insurance—Policy in the name of the insured “as mortgagees”—*  
*Repayment of mortgage debt after fire and before action—*  
*Action by mortgagees on policy—Right to recover—14 Geo.*  
*III. c. 48—14 Geo. III. c. 78, s. 83.*

Ferguson, J.  
James, J.  
Campbell, J.

The plaintiffs were mortgagees under a mortgage from B. An insurance policy covering the property mortgaged was issued by the defendants in favour of the plaintiffs “as mortgagees, B. as owner.” This was afterwards altered to read in favour of the plaintiffs “as mortgagees of B.” The premises insured by the policy were burnt down. After the fire B. repaid to the plaintiffs the amount due under the mortgage, the plaintiffs agreeing at the time of such repayment to prosecute on be-

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half of B. the plaintiffs' claim against the defendants under the policy. After such repayment the plaintiffs instituted an action against the defendants on the policy. On a Special Case being stated :

*Held*, that the existence of a personal loss or damage in the plaintiffs at the time the action was begun was not essential to their right to maintain the action, if in fact other interests intended to be covered by the policy subsisted and loss had occurred in respect of them ; and that the plaintiffs were, therefore, entitled to recover.

#### SPECIAL CASE.

This was a Special Case stated by the parties for the opinion of the Court as to whether the plaintiffs were entitled to recover against the defendants on an insurance policy, issued by the defendants, under the circumstances which are fully stated in the judgment of *Campbell, J.*

*E. M. Mitchell and Hooton*, for the plaintiffs. The interest necessary to entitle a plaintiff to bring an action on a policy is an interest at the time of insurance and at the time of loss. The interest under a policy is a chose in action and assignable. After the loss there is a debt. Assuming that Bebarfalds Ltd. were entire strangers, Hordern's trustees were entitled to assign their interest under the policy to them, and to sue on the policy, but the action would be for the benefit of the assignees : *Bank of New South Wales v. North British and Mercantile Ince. Co.* (3 N.S.W.L.R. 60 at p. 72) ; *Lloyd v. Fleming* (L.R. 7 Q.B. 299) ; *Bank of Toronto v. St. Lawrence Fire Ince. Co.* ([1903] A.C. 59). It may be contended that Bebarfalds Ltd., were not strangers, but were interested in the policy, and that since their name was not mentioned, the policy is void by virtue of 14 Geo. III., c. 48. There is no decision that the Statute extends to buildings and opinions expressed in text books differ. As regards insurances effected by mortgagees the position is made clear by 14 Geo. III. c. 78, s. 83. There have been decisions that this latter Act is of general application. See *Sinnott v. Bowden* ([1912] 2 Ch. 414 at p. 419) ; *Nott v. McLurcan* (20 W.N. 135) ; *Cleland v. South British Ince. Co.* (9 N.Z.L.R. 177) was before *Sinnott v. Bowden*. Secondly, the defendants must have been informed as to the actual position of Bebarfalds Ltd. What were the defendants to understand from the mention of them

in the policy ? Did it not convey the fact of the mortgage ? The change from the first form to the second form was not to alter the position of the parties or their rights. And see *Somerville v. Australian Mercantile Union Ince. Co.* (6 N.Z.L.R. 108) ; *Howes v. Dominion Fire & Marine Ince. Co.*, (8 Ont. App. Rep. 644) ; *Castellain v. Preston* (11 Q.B.D. 380 at p. 398), adopted in *Western Australian Bank v. Royal Ince. Co.* (5 C.L.R. 533 at p. 557). The intention of the parties is to be gathered from the fact that what is insured is the property, not the interest of the mortgagees, and the defendants must have known what was meant. If there is any doubt as to what was meant subsequent acts can be looked at : *Watcham v. Attorney-General of East Africa Protectorate* ([1919] A.C. 533 at pp. 538, 539). Though it has been assumed for the purposes of argument that 14 Geo. III. c. 48 applies to fire insurance policies, there are strong reasons why the Statute should not be applicable. See *Welford & Otter-Barry on Fire Insurance*, 2nd ed., 301. But the words mentioned on the face of the policy are ample to satisfy the Statute if it is applicable.

*Flannery, K.C.*, and *McTague*, for the defendants. It is contended by the plaintiffs that they have assigned their interest. They are not entitled to say that they might not have been entitled to sue, but as they have assigned they can sue. After the fire the interest in the loss does not become a debt. Insurance is a contract of indemnity. No question can arise here as to the mortgagee having the legal estate : *Real Property Act 1900*, s. 57. The position is the same as in *Irving v. Richardson* (2 B. & Ad. 193). The question there was " had the mortgagee insured the mortgagor's interest as well as his own ? " What are the plaintiffs suing for ? It must be for a loss to themselves and they must have sustained that particular loss. If it is for someone else, then the questions to be answered are : (1) did the policy intend it ? and (2) does the law allow it ? Plaintiffs must show loss at date of action. They had an insurable interest, but that interest was limited to the amount of the debt, and that is the measure of what they can recover. If that debt is paid to them before any action is brought, then they have no right of action. There is no case which decides that where a person is not damnified he can litigate the question. See

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 HORDERN *Burnand v. Rodonachi Sons & Co.* (7 App. Cas. 333 at pp. 339,  
 v. 340); *British Dominions General Ince. Co. Ltd. v. Duder*  
 FEDERAL ([1915] 2 K.B. 394); *Hamilton v. Mendes* (2 Burr. 1198);  
 MUTUAL *Shepherd v. Henderson* (7 App. Cas. 49 at pp. 70, 71); *Rankin*  
 INSURANCE *v. Potter* (L.R. 6 H.L. 83 at p. 127); *Ruys v. Royal Exchange*  
 CO. OF *Assurance Corporation* ([1897] 2 Q.B. 135 at p. 138). A mort-  
 AUSTRALIA *gatee* cannot insure beyond the amount of his debt; but for  
 LTD. the Statute he could insure other people's interests. As the  
 policy was originally, the plaintiffs and Bebarfalds Ltd. could  
 have sued, but owing to the alteration the plaintiffs alone could  
 deal with the defendants. As to 14 Geo. III. c. 48, no doubt  
 as to its applicability was ever raised before it was raised in  
 Welford & Otter-Barry. There is a limitation on the principle  
 that one may insure other interests than his own, namely, that  
 the insured must be understood to have insured not only his  
 own interest but that of other interests as well: Halsbury  
 Vol. XVII., par. 1031. The cases cited for the plaintiffs are  
 distinguishable. The expression "as mortgagees" is a des-  
 cription and limitation of the interest insured. 14 Geo. III.  
 c. 48 and 14 Geo. III. c. 78 can stand together—they mutually  
 assist each other. Both mortgagor and mortgagee sued in  
*Somerville v. Australian Mercantile Union Ince. Co.* A chose  
 in action is only assignable subject to equities. One of the  
 equities is that the contract is one of indemnity. Bebarfalds  
 Ltd. would have to show an actual loss in the plaintiffs. There  
 is no assignment here at all, merely a contract of undertaking  
 and indemnity. If anyone can recover, it is Bebarfalds Ltd.,  
 and they cannot recover because their interest is not mentioned  
 in the policy and the whole policy is void. It is not sufficient  
 merely to mention a person's name, the nature of the interest  
 must be stated: *Evans v. Bignold* (L.R. 4 Q.B. 622); *Shilling*  
*v. Accidental Death Ince. Co.* (2 H. & N. 42).

*E. M. Mitchell*, in reply. As to the contention that there  
 has been no assignment here, see Halsbury Vol. IV., pars. 795,  
 796. Bebarfalds Ltd. should not be put in a worse position  
 than a mere stranger: *Sparkes v. Marshall* (2 Bing. N.C. 761);  
*Powles v. Innes* (11 M. & W. 10). *Irving v. Richardson* is not  
 against the plaintiffs' contention. In *Evans v. Bignold* the

name was not mentioned at all. As to *Shilling v. Accidental Death Ince. Co.*, see *Hodson v. Observer Life Assce. Co.* (8 E. & B. 40). All defences may be set up against the assignee, but not the fact of assignment.

C.A.V.

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The judgment of the Court was delivered by

CAMPBELL, J. This is a special case submitted for the purpose of having determined the legal rights of the parties under and in respect of a fire insurance policy over certain buildings. It is difficult to suppose that the circumstances out of which the dispute has arisen can be of such rare occurrence in the history and practice of the business of insurance, as might be suggested by the absence of any record of judicial authority bearing directly on the problem which is by the special case submitted for solution. A more probable explanation of this is, that, though similar questions arising out of similar transactions must have been of frequent occurrence, they have been dealt with without recourse to litigation. The facts of the case are shortly, that a company called Bebarfalds Limited became the purchasers from Hordern's trustees, of a property consisting mainly of shops in Park Street, Sydney. It was amongst the terms of purchase that portion of the purchase money might remain unpaid on the security of a mortgage of the purchased property. The purchase was completed on these terms. Bebarfalds Limited became the registered proprietors under the Real Property Act of the property, and gave to the trustees a Real Property Act mortgage over the property to secure the payment at a fixed future date of an unpaid balance of the purchase money. In the mortgage there was a clause requiring that the mortgagor should insure the property for its full insurable value, and that in the event of loss the sum recoverable on account of such insurance should be applicable either to rebuilding, &c., or to the repayment of the mortgage debt at the option of the mortgagee. In compliance with this requirement Bebarfalds Limited obtained in their own name from the defendants an interim cover note to the extent of £4,000 on eight buildings, with equal amounts on each, and on the 8th

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March, 1918, made a proposal to the defendants for an insurance of the same eight buildings, and in the space in the proposal form left for the "Name and address of person for whom policy is to be drawn out, if not the owner, nature of interest must be stated," there was written: "the trustees for time being of the will of the late S. Hordern as mortgagees, Bebarfalds Limited as owners." The proposal was signed, "Bebarfalds Limited by their Managing Director." The defendants thereupon issued a policy No. 24998 in accordance with the proposal, in the name of the trustees as mortgagees, and Bebarfalds Limited as owners. Shortly after, the defendants were requested to alter the policy so that it should stand in the name of "the trustees for the time being of the will of the late S. Hordern as mortgagees of Bebarfald's Limited," this being, as the defendants were informed, in accordance with the covenant in the mortgage. The alteration was made, and at the date when the fire occurred and the claim arose, the policy on the face of it was expressed to be in the name of "the trustees for the time being of the will of the late S. Hordern as mortgagees of Bebarfalds Limited." There was no alteration in the number of the policy, the description of the subject of the insurance, or the amount insured. One of the endorsed conditions of the policy was that if the interest in the property should pass from the insured otherwise than by will or operation of law, the insurance should cease to attach to the property affected, unless the sanction of the defendants was obtained and endorsed on the policy. The policy was renewed from time to time, and was operative when the fire occurred on the 19th November, 1921. All insurance premiums were paid to defendants by Bebarfalds Limited. In the defendants' renewal register the policy No. 24998 was successively entered year by year (it is alleged by inadvertence) as being in the name of the trustees as mortgagees, and Bebarfalds Ltd. as owners, and the last renewal receipt issued by the defendants on 29th June, 1921, stated that the trustees as mortgagees, and Bebarfalds Ltd. as owners having applied for a continuance of policy No. 24998 from the 30th June 1921, to the 30th June 1922, the said policy is hereby renewed for such period. In the communications and statements of accounts passing between the defendants'

agents and the defendants right up to the date of the fire, there are indications that the defendants regarded the insurance under policy No. 24998 as one in which Bebarfalds Ltd., were primarily concerned. There is also a provisional extension of risk under the policy in question signed by the defendants and headed Bebarfalds Ltd., and/or others. Between August and October, 1921, Bebarfalds Ltd. contracted to sell to various purchasers seven of the eight shops covered by the policy, and on the 19th November, 1921, the premises insured were burnt or damaged by fire, the amount of damage being determined by agreement or by arbitration under the policy at £1,697 1s. 10d. At the date of the fire, the mortgage, Bebarfalds Ltd. to the trustees, was in full force and undischarged, the mortgage term not having matured.

Between the date of the fire and the commencement of the action in connection with which this case is stated, and before the due date of the mortgage, Bebarfalds made an agreement with the trustees that in consideration of Bebarfald's settlement of the mortgage to the trustees, the trustees undertook to prosecute on Bebarfald's account the trustees' claim against the defendants under the policy, Bebarfalds on their part agreeing to indemnify the trustees against all costs, charges and expenses. On the footing of this agreement, Bebarfalds Ltd. paid off the amount of the mortgage to the trustees, not then due, and the trustees then instituted an action against the defendants. To that action the defendants in effect say to the trustees as plaintiffs: "You have no right of action under the policy, because the policy being a contract of indemnity you have not suffered, and cannot in future suffer, any loss, because the mortgage, the source of your only interest, has been wholly satisfied and discharged, and if that were a good answer to the plaintiffs' action, it would no doubt be an equally effective answer to any action at law of Bebarfalds Ltd., that they had no cause of action because there was no privity of contract between them and the defendants. I cannot help thinking that such a result was not only never contemplated by the parties, but that in fact it would be a complete frustration of the actual purpose and intention of all the parties to the original contract of insurance. There must therefore be a fallacy somewhere

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in the reasoning by which the result is sought to be supported.

It seems to me that the fallacy originates in a false assumption that the interest insured by the policy is the interest of the mortgagee only, and that the indemnity intended or contemplated by the policy is an indemnity against personal loss suffered by the trustees. There is ample authority for the proposition that a mortgagee is entitled to insure for the whole value of the mortgaged property, if it is made clear that he is insuring the whole value, and not merely to cover his mortgage, and if he has intended to cover other interests besides his own he can recover and hold the surplus for those whose interests he intended to cover. See *Castellain v. Preston* (11 Q.B.D. 380, per Bowen, L.J. at p. 398); *Ebsworth & Ors. v. Alliance M. I. Coy.* (L.R. 8 C.P. 596, per Bovill, C.J., at p. 609).

The question, what interests are covered by a particular policy of insurance is primarily a question of fact depending upon the intention of the parties when the policy is effected: *Castellain v. Preston*, *supra*; *Irving v. Richardson* (2 B. & Ad. 193); *Waters v. Monarch Fire & Life Assce. Co.* (5 E. & B. 870 at p. 880); *Shepherd v. Henderson* (7 App. Cas. 49 at p. 64). It is true that, if an insurance comes within the classes of insurance to which the statute 14 Geo. III. c. 48 applies, all persons interested in the policy or for whose use, benefit, or on whose account, the policy is made, must be named therein. It seems to me unnecessary to determine in this case, the debatable question, whether that statute applies to fire policies in respect of buildings because I think, that if it does, the policy under consideration sufficiently complies with the statutory requirement. I therefore do not propose to refer to that statute further than to point out that in one aspect of it the statute clearly recognises what the general law must be considered to have previously sanctioned; that interests other than the personal interests of the assured—reading “assured” as the person with whom the policy is directly made—might be covered by a policy of insurance, and that the statute does not purport to prohibit that, but merely requires that the names of the persons interested should appear in the policy.

The question raised by the special case which has given me the greatest trouble and thought, is the vital question of fact,



what was the intention of the parties in regard to the interests to be covered by the proposed insurance? The Court has the whole of the material facts before it and is entitled to draw inferences of fact. It must one would think be a rare thing for a mortgagor and mortgagee to maintain separate and independent insurances of the same property. Having regard to the nature of the insurance contract, it would, if it were done, mean a fruitless overlapping and a waste of money, unless a difficult and often inconvenient or impracticable valuation of interests were obtained, and the insurance adjusted to them, with readjustments as quantitative changes in the value of interests occur, as they must often do in the case of mortgages to secure fluctuating balances. This inconvenience and expense can be easily avoided by obtaining one insurance to the extent of the full value of the subject matter in the name of one or other of the parties. The business community is presumably fully aware of this, and probably most insurances of mortgaged property are obtained and maintained on that footing, in the sense that it is known to the insurers, that the property is mortgaged, that it is a single insurance, and that the insurance covers interests other than that of the person who in the policy is called the insured. It may be that the names of all persons interested do not appear in such policies, but that circumstance does not militate seriously against the implication, that the known interests are consciously intended to be covered. It may well be, that being unnecessary in the case of goods, ships and merchandise, it is often omitted in the case of buildings from inadvertence without any practical consequences.

The facts of this case, as they are outlined earlier in this judgment, offer to my mind the most cogent reasons for thinking that the interests of both mortgagee and mortgagor were intended to be covered by the policy, and I draw that inference from the terms of the policy and the other relevant facts unhesitatingly. If this is a correct interpretation of the contract in the light of the facts, I think it is sufficient to dispose of the defendants' contention that the plaintiffs have no cause of action. If an interest other than the mortgagee's interest is covered by the policy, the contract of indemnity must be com-

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mensurate with the interests intended to be covered, it cannot be limited to the personal interest of the mortgagee, that would be a stultification of the contract. It cannot be true, therefore, that the existence of a personal loss or damage in the plaintiff at the time the action on the policy is begun is essential to his right to maintain the action, if in fact other interests intended to be covered by the policy subsist and loss has occurred in respect of them. The test or criterion of the defendants' liability must be, what interests within the protection of the policy have been damnified by the event insured against? If the plaintiffs' interest had continued up to the time of trial, instead of being lost and merged in the interest of Bebarfalds Ltd., the defendants do not dispute that plaintiffs would have been entitled to maintain the action for at least the amount of their interest as mortgagees within the limits of the value of the damage and the amount of the cover. Apart from the effect of the statute, 14 Geo. III. c. 48, I do not gather that defendants would deny in the circumstances just mentioned, that the plaintiffs' right to recover would extend to the full amount of the damage proved within the limits of the total cover, so that independently of the effect of the statute with which I have already dealt, the extinction of the plaintiffs' cause of action, is, according to the defendants, entirely due to the cesser of the plaintiffs' personal interest before the commencement of the action. The only direct authority cited in support of this proposition is the judgment in *Mathewson v. Western Assce. Co.* (4 Lower Canada Jurist p. 59). The basis of that judgment is certain propositions set out in it. The second of those propositions, which cannot be regarded as less than vital, appears to me to be in conflict with the statement of the law in *Castellain v. Preston*, *Waters v. Monarch Fire & Life Assce. Coy*, *Irving v. Richardson*, and other authorities, viz., that the question of what interests are covered by a policy depends on the question of fact; what interests were intended to be covered when effecting the insurance? The learned judge in *Mathewson's Case* in his second proposition, assumed that the question, what interests are covered by the policy, was a question of law and determined the question of law against the plaintiff as a consequence

following from the simple fact that the mortgagee effected the insurance. The case cannot therefore be regarded as an authority. The judgment would not, of course, be of binding authority in any case, and any persuasive effect it might have, must be tempered by the fact that a directly contrary opinion on similar facts has been expressed by the Illinois State Court of Appeal in *The Norwich Fire Insurance Company v. Broomer* (4 Am. Rep. 618). The defendant's proposition must be considered therefore as unaided by any direct judicial authority. It is futile to cite casual observations in judgments such as that of *Blackburn, J.*, in *Rankin v. Potter* (L.R. 6 H.L. 83, at p. 127), as supporting a general proposition such as the defendant is here contending for. They no more support it than the observations in the contrary sense in such cases as *Sparkes v. Marshall* (2 Bing. N.C. 761 at p. 774) militate against it. No meaning or effect can be attributed to them which is not necessarily impressed upon them by the facts of the case then under discussion. The defendant's contention can have no valid basis therefore unless it can be shown to rest on logical deduction from some sound principle. It seems to me that it fails both in reason and principle. It implies that the principle of indemnity, which is the essence of all fire insurance, is restricted to indemnification of the individual loss of the person named in the policy as the insured; yet clearly the indemnity must be commensurate with the interests intended to be insured, and interests other than the personal interest of the person named in the policy as the insured may be validly covered by the policy, and an insured who has intended to cover those other interests may according to unquestionable authority enforce an indemnity for loss suffered by others in respect of those interests. It was argued that because there is no reported case where an insured, whose personal interest in the subject of the insurance has ceased at the date of the trial, has recovered on a fire policy on behalf of other subsisting interests intended to be covered by the policy, the necessary inference is that as a matter of law and practice, no action can be maintained by an insured whose personal interest in the subject of the insurance has ceased at the commencement of the action, either on behalf of himself or anyone else. This is obviously unsound for

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one reason alone, that it would preclude an assignee of a policy or an assignee of the beneficial interest in a policy after loss from obtaining any benefit from the assignment, if the insurers refused to carry out their contract of indemnity. The sounder conclusion is, it seems to me, that so long as an interest intended by all parties to be covered by the policy continues, the policy will operate upon it and if loss occurs the right to indemnity in respect of it will arise and be enforceable by and in the name of the person called in the policy the insured, even though the insured's personal interest has wholly ceased. In such case he will sue merely as trustee for the interests he has represented in the insurance contract, which still exist at the time of action brought. I see no logical reason for holding that a person who has a legal right of action in his own name based upon a contract of indemnity to recover money for himself and others in ascertained or ascertainable proportions must be considered to have lost that right of action because his own proportion has been satisfied and discharged before action, though the proportion of the others has not, or because before action he has transferred his own right and interest to the others, whom for the purpose of the contract of indemnity he represents. Not only do I think for these reasons that the defendants fail on the interpretation of the contract expressed in the policy, but I think their main contention must be rejected on another ground. It is the duty of the Court to regard more the substance than the form of transactions if by so doing the manifest intention of parties can be the more surely effectuated. Looking at the transaction of the discharge of the mortgage in the light of the surrounding circumstances it seems to me impossible to doubt that what the trustees and Bebarfalds Ltd. had in their mind and desired to accomplish, was, to unite in Bebarfalds Ltd., the two interests in the subject of the insurance, so that they might exercise alone the practical control which properly belonged to them.

Before the documents in the case were executed, that is to say before the 3rd January, 1922, the value of the total damage to the subject of the insurance had been ascertained to be £1,697 1s. 10d. This sum no doubt was

arrived at in agreement with the defendants or was determined by arbitration under the policy. A claim for that sum specifically was made upon the defendants on the 29th December, 1921. Subject to any rights of subrogation that sum would have been recoverable by the plaintiffs, and available for reduction of the mortgage, if the plaintiffs and Bebarfalds Ltd., had done nothing after the fire and before action to alter the situation. In effect, was what they did anything more than an agreement by Bebarfalds Ltd. with the trustees that in consideration of £1,697 ls. 10d., paid by Bebarfalds Ltd., to the trustees in respect of the insurance claim, and the accelerated payment of the balance of the mortgage debt, the trustees would transfer their beneficial interest in the policy to Bebarfalds Ltd., and discharge the mortgage? If this in substance was the transaction, as I think it was, it would amount to a good equitable assignment of the trustees' beneficial interest in the policy which Bebarfalds Ltd., could enforce by action on the policy in the name of the trustees; see *Bank of N.S.W. v. North British Marine Ince. Coy.* (3 N.S.W.L.R. 60 at p. 72-3); *Lloyd v. Fleming* (L.R. 7 Q.B. 299); *Swan & Clelands Graving Dock & Slipway Coy. v. Maritime Insurance Coy.* ([1907] 1 K.B. 116); Halsbury's Laws of England Vol. IV., par. 796. There is in this view of the matter no hardship or injustice inflicted upon the defendants by reason of anything in the doctrine of subrogation. Whether the action is brought in the name of the plaintiffs on behalf of interests covered by the policy other than their own, or in the name of the plaintiffs as assignors of their own beneficial interest in the policy after loss, and for the benefit of Bebarfalds Ltd. as assignees, the cause of action is still on the basis of a strict indemnity, and the defendants would be entitled as against the plaintiffs, and as against Bebarfalds Ltd., suing through the plaintiffs, to every benefit which the doctrine of subrogation would give them if Bebarfalds Ltd. had been the persons named in the policy as the insured, and they had been seeking in the actual circumstances affecting them in relation to the property insured to enforce the contract of indemnity. For these reasons I think the plaintiffs were entitled to maintain the action against the defendants and to enforce against them a right of indemnity in respect of loss

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sustained by the interests intended to be insured under the policy including the interest of Bebarfalds Ltd. within the limits of the total amount insured.

*Verdict for the plaintiffs for  
£1,697 1s. 10d., with interest at  
6% from 29th December, 1921,  
until payment, with costs includ-  
ing costs of demurrer.*

Solicitors for the plaintiffs: *Norton, Smith & Co.*

Solicitors for the defendants: *Minter, Simpson & Co.*

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Feb. 20, 21,  
28, 26, 29;  
March 3;  
May 5.

The C.J.  
Ferguson, J.  
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*Shipping—Marine insurance—Perils of the sea—Seaworthiness  
—Ship sinking in smooth sea—Presumption—Cause of  
sinking unascertainable—Evidence—Marine Insurance  
Act (Federal) 1909, No. 11.*

In an action on a policy of marine insurance it appeared that the vessel foundered shortly after leaving the port of Newcastle during fine weather and in a smooth sea. There was no evidence that she encountered any perils of the sea. The cause of her foundering was quite unexplained. There was evidence that the vessel had suffered damage some time previously in Bass Strait whence she sailed to Sydney, was slipped, and, after slight repairs were effected, was pronounced seaworthy. She sailed from Sydney for the Manning River, where the parties had agreed that all necessary repairs were to be completed, and called at Newcastle for a cargo of coal. The jury found that the call at Newcastle had been agreed to by the parties and that the vessel was seaworthy when she left Sydney and Newcastle and returned a verdict for the plaintiffs for the full amount claimed.

*Held*, that there was evidence on which the jury were entitled to find that the call at Newcastle had been authorised.

Further, that the evidence as to the vessels seaworthiness was not displaced by the presumption arising from the circumstances of her loss, but that it became a question for the jury to decide on the whole of the facts