of law and fact; otherwise, it would be appealed on questions of law.[20] This historical interpretation has not been applied to the determination of the right to a jury trial. Under Ohio G.C., Section 11379 all actions for money only, or for the recovery of specific real or personal property are entitled to a jury trial. The statute limits the right to a jury trial to these specific instances whether historically legal or equitable, so that some cases historically equitable may have a jury trial as of right. The equitable counterclaim historically is an affirmative action in equity. Now if the historical distinction does not apply to the right to a jury trial, it may theoretically be that in some instances the defendant pleading an equitable counterclaim may be entitled to a jury trial under the statute. However, if we assume that the action is equitable and does not fall within the classification of Ohio G.C. Section 11379, and the plaintiff's action is one entitled to a jury, what effect does the counterclaim have? In *Buckner* v. *Mear*[21] it is said that even though the plaintiff's cause of action is triable by a jury, if the answer constitutes an equitable cause of action which if established will extinguish or supersede the plaintiff's cause of action, the new issues are triable to the court and not as a matter of right to the jury. Thus, it may be said that an equitable counterclaim, unless it falls within the requirements of Ohio G.C. Section 11379, will not admit of a trial by jury as of right. It is an independent action calling to it its own mode of trial.

In the principal case it would seem that the court was right in requiring a jury trial. The plaintiff's action was one at law for money only and entitled to a jury trial unless changed by an equitable counterclaim in the defendant's answer. However, the answer in the principal case was an equitable defense and could not, therefore, change the mode of trial. Consequently, the plaintiff was entitled to a jury trial and it was error to allow a trial to the court. F.A.R.

INSURANCE

Insurance — Bankruptcy — Rights of Injured Party to Proceed Against the Insurer

Morris, Inc., an Ohio corporation engaged in the business of interstate hauling, carried liability insurance with the defendant company for the benefit of shippers using its service. On February 25, 1936, merchandise consigned to the plaintiff was destroyed in transit. Morris, Inc. filed a petition in bankruptcy and was duly adjudged a bankrupt on

[20] *Supra*, notes 9 and 16; Ohio General Code, sec. 12223-1.
[21] 26 Ohio St. 514 (1875).

December 14, 1936. Plaintiff applied to the bankruptcy court, and was granted permission to bring suit against the trustee in bankruptcy of Morris, Inc. Judgment being rendered on default against the trustee, the plaintiff filed a supplemental petition under favor of G.C. 9510-4, made the insurance company a new party defendant, and prayed judgment for the amount recovered in the original action against the trustee. The company filed a demurrer which the trial court sustained. An appeal being taken, the Court of Appeals for Franklin County reversed the decision of the trial court,[1] and the cause reached the Supreme Court upon a motion to certify. A majority of the high court (three judges dissentng) held that an injured party, to reach insurance money by filing a supplemental petiton under G.C. 9510-4, must secure a judgment against the *insured.* The statute is in derogation of the common law, and must be strictly construed. *A judgment against the insured's trustee in bankruptcy does not meet the requirement of the statute.*[2]

In the absence of statute, an injured party acquires no rights under a liability policy insuring the tort-feasor.[3] The liability of the insurer is usually contingent upon some loss, within the scope of the policy, suffered by the assured. Unless the policy has an express provision indicating an intent to benefit the injured person,[4] or is so written that such an intent may reasonably be inferred,[5] the insurance contract is deemed to be for the sole benefit of the assured. Payment by the assured is a condition precedent to the liability of the insurer. "No action" clauses may properly be incorporated into the contract, which provide that no action will lie against the insurer prior to actual loss to the assured.[6] Thus, when the insured tort-feasor becomes insolvent or unable to pay his debt the injured party's judgment against him is of no avail. The judgment creditor gains no cause of action against the insurer. The principle of subrogation does not operate in his favor, because no right accrues to the assured prior to an actual payment. The insolvency or bankruptcy of the assured relieves the insurer of his con-

[1] Gross Galesburg Co. v. The World Fire and Marine Ins. Co., *et al,* in the Court of Appeals of Franklin County, Ohio, decision rendered on May 10, 1939, docket no. 2,955.

[2] Gross Galesburg Co., Appellee v. Ingalls, Jr., Trustee; The World Fire and Marine Ins. Co., Appellant, 136 Ohio St. 450 (1940).

[3] VANCE ON INSURANCE, 2nd ed., s. 178; State Auto Ins. Co. v. Col. Mot. Exp., 15 Ohio L. Abs. 747 (1933); "One who suffers injuries which come within the provisions of a liability insurance policy, is not in privity of contract with the insurer and cannot reach the proceeds of the policy for the payment of his claim by an action against the insurer, unless such recovery is permitted by statute or by the expressed provisions of the policy."

[4] Slavens v. Standard Accident Ins. Co., 27 Fed. (2d) 859 (1928).

[5] See OHIO G.C., Sections 614-115.

[6] Goodman v. Georgia Life Insurance Co., 189 Ala. 130, 66 So. 649 (1914).

tingent liability under the policy, and the injured party obtains no benefit therefrom.[7]

Little has been done in the trend of court decisions to ameliorate this condition. It has been held that the transfer of a debtor's assets to a trustee in bankruptcy for the benefit of his creditors (the injured party beng a judgment creditor) constitutes a payment sufficient to satisfy a policy wherein the insurer's liability is conditioned upon payment by the assured.[8] A few courts, in the absence of statute, have allowed a garnishment of the payment by the insurer.[9] But the more common view has been to deny to the injured party the benefits of this device.[10]

The most significant changes, inuring to the benefit of persons injured, have come about through legislation. Many of the statutes in this area have been so written and construed as to become an integral part of the liability insurance contract. They, in effect, subrogate the injured person having an unsatisfied judgment against the assured to the rights of the assured against the insurance company. Hence, the liability of the insurer cannot be conditioned upon pre-payment, and the injured person does not suffer (nor the insurer avoid liablity) by the insolvency or the bankruptcy of the assured tort-feasor.[11] Some states have gone so far as to provide that the injured party may join the insurance company in the original action.[12] Legislation in this area has been impelled, in large part, by the increased volume of liability insurance litigation resulting from the growing number of highway mishaps.[13]

The Ohio statute, invoked by the plaintiff in the principal case, is similar in character to the subrogation statutes described above. The term "subrogation," however, does not appear in its clauses.[14] The present Ohio statutes, relevant to this problem, evolved from early laws enacted to benefit employees who had received injuries in the course of their employment. Prior to 1914, employers were subject to com-

[7] Hollings v. Brown, 202 Ala. 504, 80 So. 792 (1922).

[8] Travelers Ins. Co. v. Moses, 63 N.J.Eq. 260, 49 A. 720, 92 Am. St. Rep. 663 (1901).

[9] Patterson v. Adan, 119 Minn. 308, 138 N.W. 281, 48 L.R.A. (N.S.) 184 (1912)

[10] Allen v. Aetna Life Ins. Co., 145 Fed. 881. 76 C.C.A. 265, 7 L.R.A. (N.S.) 958 (1906).

[11] Stacey v. Fid. & Cas. Co., 21 Ohio App. 70, 152 N.E. 794 (1925), aff'd, 114 Ohio St. 633, 151 N.E. 718 (1926): "The present effect of the statutes is to subrogate the injured person, who obtains a judgment against the insured, to the rights of the insured, and to the insurance money to which he is then entitled."

[12] Wis. Stat. 1927, s. 85.25.

[13] Benoy's Ohio Insurance and Negligence Law, 1936, s. 577.

[14] Hartford Acc. and Indem. Co. v. Randall, 125 Ohio St. 581, 183 N.E. 433, (1932): "The word subrogation doesn't appear in 9510-4, but it clearly involves the principle of subrogation, and it is therefore made a part of every liability insurance policy in Ohio, where claims is for personal injury or death."

mon law actions for such injuries. While the common law rule obtained, an employee recovering against his employer for injuries sustained in an industrial accident had no right against the insurance company.[15] In 1910, the legislature passed "An Act Relative to Employers' Liability Risks" which—in effect—prohibited policy provisions releasing the insurance company in the event of the insolvency of the insured.[16] The act was amended in 1919, and the principle was extended in favor of persons injured by any "person, firm or corporation" carrying liabilty insurance.[17] The benefits of this amendment were limited to persons suffering *bodily injury* through the negligence of the assured. They did not extend to persons attempting to recover under policies insuring against liability for damage to property;[18] nor did they favor a husband suing to recover damages for the loss of the services of his wife.[19]

The recent amendment (invoked by the plaintiff in the principal case) gave the law is present scope; it is now calculated to benefit persons who have recovered a final judgment against the insured "firm, person or corporation . . . for loss or damages on account of bodily injury or death, *for loss or damage to tangible or intangible property* of any person, firm or corporation, *for loss or damage to a person on account of bodily injury to his wife, minor child or children. . . .*"[20] The significant effect of the statute is that the liability of the insurer exists prior to and independent of any actual payment by the assured, regardless of provisions in the policy to the contrary.[21] Although the statute gives the injured person a right to recover against the insurer (where none existed under the common law), his rights are not greater than those of the policy holder.[22] The insurer is made liable only within the terms of the insurance contract, and such liability is extended only by the fact that it may no longer be made contingent upon the actual

[15] Garrett v. Travelers Ins. Co., 9 Ohio N.P. (N.S.) 412, 20 Ohio Dec. 181 (1909): "An injured employee of the insured, who has recovered a judgment against his employer, can not maintain an action on policy of employer's liability insurance against the insurance company, because (1) the obligations of the policy do not extend beyond the two contracting parties, (2) there is no jural relation between the injured employee and the insurance company, (3) the undertaking of the company is only to indemnify for loss actually sustained by satisfaction of judgment."

[16] Ohio G.C. sec. 9510-1; 101 Ohio Laws 191, 192 (1910); see also 9510-2.

[17] Ohio G.C. sec. 9510-3; 108 Ohio Laws 385, pt. I, s. 1 (1919).

[18] State Auto Mut. v. Col. Mot. Exp., *supra*, note 3.

[19] New Amsterdam Cas. Co. v. Nadler, 115 Ohio St. 472, 154 N.E. 736 (1933); Klein v. Employer's Liability Assur. Corp., 19 Ohio N.P. (N.S.) 426, aff'd, 9 Ohio App. 241, 29 Ohio C.A. 175 (1917).

[20] Ohio G.C., sec. 9510-4 as amended in 115 Ohio Laws 403, s. 1.

[21] Verducci v. Cas. Co. of Am., 96 Ohio St. 260, 117 N.E. 235 (1917); Steinback v. Maryland Cas. Co., 15 Ohio App. 392 (1921).

[22] Rohlf v. Great Am. Mut. Indem. Co., 27 Ohio App. 208, 161 N.E. 232 (1927).

payment by the assured.[23] A concise and inclusive exposition of the effect of G.C. 9510-4 may be found in the opinion of the Ohio Supreme Court in the case of *Stacey* v. *Fidelity and Casualty Co.*,[24] where it held by virtue of G.C. 9510-4 a judgment creditor is entitled to a direct action against the insurer *after obtaining a judgment against the insured*, and 30 days after judgment is rendered, provided that any conditions of the policy as to notice which would be binding upon the assured have been met. Clearly, the statute creates no cause of action against the insurer until the injured party's claim against the assured has been reduced to judgment.[25] As this statute, relied upon by the plaintiff in the instant case, created rights which were not existent under the common law, by the ordinary rules of construction, it must be read strictly. The principal ground for the majority view lies in the fact that the injured plaintiff did not satisfactorily comply wth the statutory requirement by first taking judgment against the *assured company*. Judgment was against the insured company's *trustee in bankruptcy*. This, said the court, did not satisfy the conditions of the statute, and an action relying thereon must fail.

The three dissenting judges have not supported their position with an opinion. However, the holding of the Court of Appeals for Franklin County favored the plaintiff and may be profitably examined.[26] The lower appellate court held that the distinction between a judgment against the insured party and a judgment against his trustee in bankruptcy was purely technical; that under Section 63b of the Bankruptcy Act (now sec. 57d of the Chandler Act)[27] the bankruptcy court was given power, pursuant to a proper application by the claimant, to liquidate contingent claims in such a manner as it might see fit; and that statutory conditions respecting judgments as conditions precedent to action against third parties (*i.e.*, shareholders) might be waived if performance were in some manner impossible or impracticable. The court leans heavily upon *Firestone Tire and Rubber Co.* v. *Agnew*, with respect to the latter proposition.[28] In the *Firestone case*, they brought suit

[23] Stacey v. Fid. & Cas. Co., *supra*, note 11: "The party injured can't recover under G.C. 9510-3, or 9510-4 where the insured party failed to notify the insurer of the accident as required by the policy."

See also, U.S. Casualty Co. v. Breese, 21 Ohio App. 521, 153 N.E. 206 (1925), where the insured failed to notify the insurer as required by the policy.

But in Hartford Acc. & Indem. Co. v. Randall, *supra*, note 14, it was held that G.C. 9510-4. "invests the injured person with such beneficial interest as entitles him to give notice of suit as required of the insured by the policy, and this independent of the knowledge or consent of the insured."

[24] Stacey v. Fidelty and Casualty Co., *supra*, note 11.

[25] Steinbach v. Maryland Cas Co., 15 Ohio App. 392 (1921).

[26] *Supra*, note 1.

[27] June 22, 1938, 52 Stat. 866, c. 575; 11 U.S.C.A. 93.

[28] Firestone Tire and Rubber Co. v. Agnew, 86 N.E. 1116, 194 N. Y. 165, 24 L.R.A. (N.S.) 628, 16 Ann. Cas. 1150 (1909).

against certain shareholders to enforce liability for unpaid stock purchases. A New York statute had been enacted to *limit* creditors' rights against shareholders by making a judgment against the corporation (returned unsatisfied) a condition precedent to recovery, and by placing a two-year limitation upon the bringing of suits. The court said, in effect, that when such limits imposed by statute become impossible to perform—or if performance were a mere gesture—they might be dispensed with to the extent that the allowance of a claim by the bankruptcy court would satisfy the requirement of a final judgment. Here was not a right created by the statute under construction, but one *limiting* an existing right. The court chose to apply a liberal construction. If, in the instant case, it might be validly contended that the bankruptcy of the assured made performance of the statutory condition (namely a judgment against the bankrupt) impossible or impracticable of performance, a more liberal construction of the statute (G.C. 9510-4) could be defended on the ground that such construction was necessary to give effect to the intent of the legislature to benefit the party suffering injury. However, an examination of some of the cases involving similar problems impels the belief that the plaintiff herein could have met the provisions of the statute by following a well-established practice. Specifically, he could have brought his action against the assured bankrupt, after the adjudication, reduced his claim to a final judgment against the assured, and filed a completely valid supplemental petition against the insurer.

The filing of a petition in bankruptcy does not preclude the commencement of an action against the bankrupt;[29] nor does an actual adjudication have the effect of preventing the commencement of such suit.[30] An adjudication does not have the effect of ousting the state courts of their jurisdiction over suits against the bankrupt.[31] In fact, the opinion of one federal court respecting an application of a plaintiff for *permission to sue* the bankrupt in a state court is persuasive to the view that federal courts have no power to grant such permission, or

[29] In Woods v. Berry, 296 P. 332, 111 Cal. App. 675 (1931), the liability of the bankrupt's co-defendant depended primarily upon the liability of the bankrupt. The defendant contended that the fact of filing precluded the initiation of a new action against the bankrupt. It was held that the filing of a petition in bankruptcy does not prevent commencement of an action against the bankrupt; the proper procedure being for the adverse party to ask for a stay—the granting of which is within the wise discretion of the bankruptcy court.

See also, Perkins v. 1st Nat'l Bank, 56 P. (2d) 639, 47 Ariz. 376 (1936); Kantola v. Hendrickson, 12 P. (2d) 866, 52 Idaho 217 (1932); COLLIER ON BANKRUPTCY, 13 ed., 1923, Vol. 1, p. 693.

[30] Thompson v. Hill, 119 So. 320, 152 Miss. 390 (1929); *Contra*, Bank of Rothville v. Zaleuke, 295 S.W. 520, 221 Mo. App. 1051 (1927).

[31] Brazil v. Azevedo, 162 P. 1049, 32 Cal. App. 364 (1916).

that such a permit would be of no legal efficacy where no order restraining such suits has previously issued. Commenting in *In Re Natow Bros.*[32] one federal court held that, "This court has not enjoined petitioner from bringing such suit in any such court on this, or any other, claim . . . Upon what basis or on what theory such an order could be issued, or, if issued, would be of any legal force and effect, it is difficult to understand." It is evident that the filing of a petition and the consequent adjudication of the assured in the principal case did not operate automatically to prevent an action by this plaintiff against him. It seems unnecessary that he should have applied to the court at all. In any event, he should not have applied for permission to move against the trustee. He had no valid cause of action against the trustee for the negligence of the bankrupt, or the negligent breach of the contract to carry safely.[33]

The bankruptcy court has the power, under Section 57d of the Chandler Act,[34] (formerly Section 63b of the Bankruptcy Act of 1898) to liquidate contingent and unliquidated claims. If the claim against the bankrupt in the instant case be viewed as an unliquidated tort claim, it was not provable against the estate for the reason that it was not pending when the petition in bankruptcy was filed.[35] Under this hypothesis, the court's permission to the plaintiff to sue the trustee appears improper, because it is difficult to see how the bankruptcy court could be vested with jurisdiction over a non-provable claim within the meaning of 57d. However, the claim of the plaintiff was also grounded on a negligent breach of a contract to carry-safely, and as such it would be provable against the estate under Section 63a (4) of the Chandler Act.[36] The bankruptcy court would have the power (under Section 57d of the Chandler Act) to liquidate such a claim. It does not follow that it became the duty (or even the prerogative) of the court to advise the plaintiff that his default judgment against the trustee would be useless.

While it is well-established that the filing of a suit against a bankrupt is not automatically precluded by adjudication, it is equally true that the bankruptcy court, upon proper application by the bankrupt or other party in interest, has power to stay such suit pending discharge of the bankrupt.[37] This power does not extend to suits brought in good

[32] *In Re* Natow Bros., 283 Fed. 522, 49 A.B.R. 245 (D. C. 1922).
[33] *In Re* Heim Milk Prod. Co., 183 Fed. 787 (D.C. 1910).
[34] *Supra*, note 27.
[35] June 22, 1938, 52 Stat. 873, ch. 575, s.1 (s. 63); 11 U.S.C.A. 103.
[36] *Supra*, note 35; Maynard v. Elliott, 283 U.S. 273, 51 Sup. Ct. Rep. 390, 75 L. Ed. 1028 (1930).
[37] June 22, 1938, 52 Stat. 849, ch. 575, s.1 (s.11); 11 U.S.C.A. 29.

faith against the bankrupt upon claims which are not released by a discharge.[38] The power to stay proceedings against the bankrupt exists only in the case of dischargable debts.[39] The power to stay is not mandatory,[40] and it must be exercised—in the case of dischargable claims—in the use of the court's wise discretion. The federal courts have limited themselves in the exercise of this discretionary power. The general criterion was enunciated in the leading case of *Foust* v. *Munson S. S. Lines*, where the court held that the bankruptcy court should not stay proceedings against the bankrupt unless such proceedings would *hinder, delay or embarrass* the administration of the estate.[41] In using this discretionary power the courts have evolved a rather clear principle respecting claims in the area of the principal case. Where a creditor brings action against the bankrupt for the purpose of reducing his claim to a judgment as a condition precedent to an action to enforce the liability of a third party (*i.e.*, a surety on a bond conditioned upon a final judgment against the principal), a stay of such proceedings has been held to be an abuse of discretion.[42] In *Mack* v. *Pacific S. S. Lines, Ltd.*,[43] an employee who had a personal injury claim against a corporate debtor undergoing reorganization under 77b, was held to be entitled to a *modification of a restraining order* so that he might reduce his claim to judgment and move against the insurer. The extent of this willingness to allow claimants to proceed against the bankrupt is well phrased in *Remington on Bankruptcy*, Section 1974: "It is proper for the bankruptcy court to *stay proceedings for a discharge*, and to *refuse to stay a suit against the bankrupt*, in order to permit a qualified judgment to be taken where the obtaining of such judgment, or the taking of other steps, is necessary in order to perfect the creditor's rights against a third party, surety or guarantor.[44]

In view of this tendency, clearly embracing the circumstances of the principal case, it appears that no impossibility of performance existed

[38] *In Re* Lawrence, 163 Fed. 131, 10 A.B.R. 698 (D.C. 1908); COLLIER ON BANKRUPTCY, 13th ed., 1923, Vol. 1, p. 413.

[39] Holmes v. Davidson, 84 Fed. (2d) 111 (C.C.A. 1936).

[40] Connell v. Walker, 291 U.S. 1, 54 Sup. Ct. Rep. 257, 78 L.Ed. 613 (1934).

[41] Foust v. Munson S.S. Lines, 299 U.S. 77, 81 L. Ed. 49, 57 Sup. Ct. Rep. 90, 298 U.S. 649 (1936), under 77b. Followed in: First Nat'l Bank of Wellston v. Conway Board Estates Co., 94 Fed. (2d) 736 (C.C.A. 1938), under 77b; Mack v. Pacific S.S. Lines, Ltd., 94 Fed. (2d) 95 (C.C.A. 1938), under 77b; *In Re* B.M.O. Corp., 24 Fed. Supp. 652 (D.C. 1938), power to stay validity exercised under 77b.

[42] *In Re* Mercedes Import Co., 166 Fed. 427, 21 A.B.R. 590 (C.C.A. 1908); *In Re* Rosenthal, 108 Fed. 358 (D.C. 1901); Roebling's Sons Co. of N. Y. v. Federal Storage Battery Co., 173 N.Y. Supp.. 297, 185 App. Div. 430 (1918).

[43] Mack v. Pacific S.S. Lines, Ltd., *supra*, note 41.

[44] Brown v. Four-in-One Coal Co., 286 Fed. 512, 2 A.B.R. (N.S.) 569, (C.C.A. 1923); *In Re* Rosenstein, 276 Fed. 704, 47 A.B.R. 339 (C.C.A. 1921); *In Re* Remington Auto & Motor Co., 166 Fed. 427, 21 A.B.R. 590 (C.C.A.N.Y., reversing 20 A.B.R. 648).

with respect to compliance with the Ohio statute. The plaintiff need only have elected a proper and available remedy by bringing his action against the bankrupt, reducing his claim to judgment, and filing against the insurer thereafter. R.M.A.

LABOR LAW

Limitation on Definition of a Trade Dispute— Picketing as an Exercise of Free Speech

The plaintiff, operator of an exclusive restaurant in the City of Cleveland, petitioned for an injunction restraining the officers and members of three unincorporated labor unions from picketing her place of business. The defendants were picketing in an attempt to persuade her to discharge her employees unless they became members of one of the defendant unions. The plaintiff-employer ran an open shop, did not attempt to persuade or dissuade her employees from joining any of the defendant unions, made no inquiry as to union affiliations when hiring employees, never discharged an employee for union activities, had no dispute with her employees about the wages or conditions, and did not undersell restaurants employing union help exclusively. The trial court rendered a decree restraining all picketing, bannering, and boycotting of plaintiff's restaurant. On review the Court of Appeals permitted peaceful picketing and boycotting. The Supreme Court of Ohio reversed the Appellate Court decree and rendered final judgment in conformity with the Common Pleas Court decree, Judges Zimmerman and Day dissenting.[1]

The instant case is the first in which the Supreme Court of Ohio has been faced with the determination of whether or not the picketing union's members must be, or have been, employees of the picketed employer in order for a trade dispute to be in existence. The Courts of Ohio have for many years held that the right to picket peacefully is dependent upon the existence of a trade dispute,[2] but the question has continually arisen as to exactly what that term connotes. The majority in the instant case cite *La France Electrical Construction & Supply Co.* v. *I.B.E.W.*,[3] which held a trade dispute to exist when former employees were seeking to secure the right to work under terms of employment

[1] Crosby v. Rath 136 Ohio St. 352, Ohio Bar, March 11, 1940 (1940). The decision in this case was rendered on the ground that there were no acts of violence.

[2] La France Co. v. Elec. Workers 108 Ohio St. 61, 140 N.E. 899 (1923); Lundoff-Bicknell Co. v. Smith 24 Ohio App. 294, 156 N.E. 243 (1927); Driggs Farms, Inc. v. Milk Drivers' Union, 49 Ohio App. 303, 3 Ohio Op. 212 (1935); 2 O.S.L.J. 301.

[3] 108 Ohio St. 61, 140 N.E. 899 (1923).