

ments, held that the fund in the hands of the assignee was not garnishable. And the supreme court, approving that decision and disapproving one to the contrary announced by the court of civil appeals for the sixth district, *Johnson v. Chapman Milling Co.*, 37 S. W. (2d) 776, held that "the questions at issue have been definitely settled by this court in the cases of" *Patty-Joiner & Eubank Co. v. Cummins*, *supra*, and *Haijek & Simecek v. Luck*, *supra*.

Accepting as we do that court's construction of the provisions in question, we are of opinion that they are not repugnant to the Bankruptcy Act. This case is ruled by our decision in *Pobreslo v. Joseph M. Boyd Co.*, *ante*, p. 518.

Judgment affirmed.

AETNA LIFE INSURANCE CO. ET AL. *v.* MOSES.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 137. Argued December 8, 1932.—Decided January 9, 1933.

1. Under the Longshoremen's and Harbor Workers' Compensation Act,—made applicable to the District of Columbia as a workmen's compensation law—where an employee is killed in the course of his employment by the negligence of a stranger, and the administratrix, being also the sole beneficiary, accepts compensation, there is an implied statutory assignment to the employer of her cause of action for the negligence under the District death statute. P. 537.
2. In such case the Compensation Act by implication gives the employer the same control over the institution of the death action, the compromise and settlement of the claim against the wrongdoer, and the disposition of the proceeds, as it gives where the injury results only in disability. P. 538.
3. Although the Compensation Act does not say that the action for wrongful death may be brought in the name of the employer, this is implied in its purpose to effect a complete transfer of the cause of action, notwithstanding that the common law rule against actions in the names of assignees of choses in action survives in the forum. P. 540.

4. An insurer under the Compensation Act, though required to pay an award directly, is nevertheless an indemnitor and, to the extent that it has paid, is entitled to be subrogated to the employer's right of recovery against third persons. P. 541.
 5. The employer, being directed by the Act to distribute the proceeds, is the party to bring the action for wrongful death, and may show that it is for the use of the insurer and of the widow and administratrix, according to their beneficial interests. P. 542.
 6. Whether under Equity Rule 13 of the Supreme Court of the District of Columbia, the insurer and the widow-administratrix may join in the action for wrongful death as legal plaintiffs, this Court does not decide,—it being a question of local practice. P. 543.
- 61 App. D. C. 74, 57 F. (2d) 440, reversed.

CERTIORARI * to review the affirmance of a judgment for the defendant in an action for wrongful death. The trial court struck the declaration for misjoinder of parties plaintiff, and entered judgment for the defendants when the plaintiffs elected to stand on the declaration.

Messrs. Charles W. Arth and Leonard J. Ganse for petitioners.

The employer's liability is only contingent. He can not sue in his own right. *Red Wing v. Eichinger*, 163 Minn. 54. Unless the insurer may enforce its claim, any action against the tort-feasor must fail.

The Compensation Act uses "carrier" and "employer" synonymously. The insurer is under a direct obligation to the injured employee. *American Mut. Liability Ins. Co. v. Patrick*, 157 Tenn. 618, 621. Its assumption of all liabilities and duties imposed on the employer implies corresponding rights. *Sarber v. Aetna Life Ins. Co.*, 23 F. (2d) 434, cert. den., 277 U. S. 577.

The right of action passing to the employer by statutory assignment under § 33 (b) likewise passed to the insurer by necessary implication when it paid the death benefit awarded.

* See Table of Cases Reported in this volume.

As indemnitor, the insurer has a right of action against the negligent third person. *Travelers' Ins. Co. v. Great Lakes Engineering Works*, 184 Fed. 426; *Workmen's Compensation Exchange v. Chicago, M., St. P. & P. R. Co.*, 45 F. (2d) 885. It also took a right of action as conventional subrogee under the terms of the policy. *The Koku-sai Kisen Kabushiki Kaisha*, 44 F. (2d) 659; *Globe Indemnity Co. v. Toye Bros. Auto Co.*, 14 La. App. 142.

The widow, having accepted the death benefit under the Act, may not maintain an action in her own name, although she has an interest as statutory *cestui que trust* in any excess of recovery had against defendant (*Hunt v. Bank Line*, 35 F. (2d) 136; *The Aden Maru*, 51 F. (2d) 599, 600); and the employer may not maintain an action in his own right because he has sustained no loss. *Red Wing v. Eichinger*, *supra*.

The Compensation Act, § 33, creates a new cause of action, makes complete provision for all of its purposes, and is not controlled or limited by the death statute in any respect. *Moore v. Christenson S. S. Co.*, 49 F. (2d) 807, affirmed, 53 F. (2d) 299; *Hyde v. Southern Ry. Co.*, 31 App. D. C. 466. See also *Smith's Dock Co. v. John Redhead & Sons*, (1912) 2 K. B. 323.

The Compensation Act and the death statute are inconsistent. Limitations of time are different; causes of action are different; beneficiaries are different; damages are different; and the distribution of damages is different.

The rules of the Supreme Court of the District of Columbia govern the form of action in this case and designate who must or may be made parties herein. These rules have the force of law. *Judd & Detweiler v. Gittings*, 43 App. D. C. 304, 311; *Murphy v. Gould*, 39 App. D. C. 363, 367. The insurer, and the widow, both personally and as administratrix, are the real parties in interest. The employer has a direct but contingent liability. He should sue as assignor to the use of the Insurance Company, his

assignee. See *McKenzie v. Missouri Stables*, 34 S. W. (2d) 136.

The technical niceties of pleading do not apply under compensation acts. *Clough & Molloy v. Shilling*, 149 Md. 189. For variation in the manner of pleading parties plaintiff in death actions similar to that here presented, see *Maryland Casualty Co. v. Union Bridge Co.*, 145 Md. 644; *State Accident Fund v. New York, P. & N. R. Co.*, 141 Md. 305; *Bethlehem Steel Co. v. Raymond Concrete Pile Co.*, 141 Md. 67; *Kaufman v. United Rys. & Elec. Co.*, 135 Md. 524.

Mr. H. Clay Espey, with whom *Messrs. Merritt U. Hayden* and *James O'D. Moran* were on the brief, for respondent.

The two legal plaintiffs are entitled to bring suit under any theory as assignees only.

The administrator or executor of the deceased is the only proper party plaintiff in an action in the District of Columbia against a third party whose negligence has caused the death of the deceased. *Fleming v. Capital Traction Co.*, 40 App. D. C. 489; *Ferguson v. Railroad Co.*, 6 App. D. C. 525. Dist.: *Hyde v. Southern Ry.*, 31 App. D. C. 466.

The Compensation Act was designed principally to afford an adjustment of the rights and obligations of employers and employees, principally the latter; it was not intended to disturb the liabilities of strangers to the employment. *Silvia v. Scotten*, 32 Del. 295, 299. It would be far-fetched to hold that in view of the inconsistencies, a new cause of action arises against a negligent stranger to the employment for the reimbursement of the employer and his insurance carrier, where there is absolutely no language in the Compensation Act creating such new cause of action.

If the Act creates such new cause of action, then the third person would be subjected to a double liability for such wrongful death: (1) under the Compensation Act; and (2) under "Lord Campbell's Act."

The employer and the insurer are not proper legal parties plaintiff in this action. The defendant's liability is entirely statutory, and therefore subject to the principle that statutes in derogation of the common law are to be strictly construed.

Although the Compensation Act assigns to the employer the right of the person entitled to compensation, it nowhere gives him express authority to bring a suit in his own name. An assignee may not sue in his own name without special statutory authority. *Glenn v. Marbury*, 145 U. S. 499; *Taylor v. Anderson*, 275 U. S. 431; *Metropolitan Coach Co. v. Freund*, 42 App. D. C. 283; *Commercial Nat'l Bank v. Consumers' Brewing Co.*, 16 App. D. C. 186; *Armstrong, Witworth & Co. v. Norton*, 15 App. D. C. 223.

The common law on this subject has been changed in the District of Columbia only to permit the assignee to sue in his own name where a judgment or certain contract actions are assigned. Unliquidated tort claims are unmentioned. This was done by Act of Congress of March 3, 1901, D. C. Code, c. 11, §§ 431-434.

The insurer is not a proper legal plaintiff. The Act makes no assignment to the insurer. The assignment by the subrogation clause in the policy would not permit the insurer to sue in its own name. *Glenn v. Marbury*, *supra*. Moreover an action for personal injuries is not assignable in the District. *Lamont v. Washington & Georgetown R. Co.*, 2 Mackey 502.

Even if a new cause of action is created by the Compensation Act, it is none the less a cause of action for death wrongfully caused by another and is not assignable.

Southern Pac. Co. v. Winton, 27 Tex. Civ. App. 503; *Marsh v. W. N. Y. & P. Ry. Co.*, 204 Pa. 229.

Neither the employer nor the insurer may be a proper legal plaintiff under District of Columbia Supreme Court Equity Rule No. 13. The rule merely states an established rule of equity practice, in force in the District before even assignees of contract claims could sue in their own names at law. *Young v. Kelly*, 3 App. D. C. 296. The statute permitting assignees of liquidated contract claims to sue in their own names (D. C. Code, 1924, c. 11, §§ 431-434), was not enacted until 1901. Before this statute was passed, it was definitely established that no assignee could sue in his own name at law. *Glenn v. Marbury*, *supra*. The Equity Rule was not intended for actions at law. To hold that all plaintiffs in the present case are properly joined by reason of Equity Rule No. 13 would be to revolutionize the practice in the District.

By the Act of 1901, assignees of judgments and of liquidated contract claims were expressly authorized to sue in their own name. By implication other types of claims were excluded. A rule of court can not repeal a statute or regulate a matter already regulated by statute. *Hamilton v. Fowler*, 83 Fed. 321, 326; *Schnitzer v. Stein*, 96 Ore. 343; *Nissen v. Flaherty*, 117 Me. 534. A rule of court can not be in contravention of the common law or the law as declared in numerous decisions of the court. *DeLorme v. Pease*, 19 Ga. 220, 227; *Huff v. Shepperd*, 58 Mo. 242, 246.

Wherever a state court permits an employer or insurance company to recover in its own name, the act makes provision accordingly. *Silvia v. Scotten*, *supra*; *Insurance Co. v. Railways*, 39 Cal. App. 388; *Henderson Tel. & Tel. Co. v. Owensboro Tel. & Tel. Co.*, 192 Ky. 322; *Texas & P. R. Co. v. Archer*, 203 S. W. 796; *Jordan v. Orcutt*, 181 N. E. 661.

The widow as an individual and the insurance company are not proper use plaintiffs. The administratrix is the only proper legal party plaintiff, and the employer may be the only proper use plaintiff. See *Luckey v. Union Pac. Ry. Co.*, 117 Neb. 85.

MR. JUSTICE STONE delivered the opinion of the Court.

Roberts, an employee of petitioner Bralove, was killed in the course of his employment, by the alleged negligence of respondent. His widow, who was also his administratrix, claimed and has accepted an award of compensation under the Longshoremen's and Harbor Workers' Compensation Act (March 4, 1927, c. 509, 44 Stat. 1924), made applicable as a workmen's compensation law in the District of Columbia by Act of May 17, 1928, c. 612, 45 Stat. 600. The award directed the employer and petitioner, The Aetna Life Insurance Company, his insurer,¹ to pay compensation to the widow in periodic installments, and the expenses attendant upon the burial of the deceased.

The present suit was brought in the Supreme Court of the District of Columbia on the theory that the acceptance of compensation awarded under the statute operated as an assignment of the administratrix's right to pursue the respondent for damages for the wrongful death, and that the insurer succeeded to that right by subrogation. The declaration named as plaintiffs petitioner The Aetna Life Insurance Company, "in its own right and also to the

¹ Under the terms of the policy the insurer obligated itself to pay all installments of compensation directly to the person entitled to them "because of the obligation for compensation . . . imposed upon . . . this Employer," as well as to indemnify the employer against any loss by reason of his liability. The former provision is required by §§ 35 and 36 of the statute "in order that the liability for compensation imposed by this Act may be most effectively discharged by the employer, and in order that the administration of this Act in respect of such liability may be facilitated. . . ."

use of" the widow "in her own right and as administratrix," and petitioner Bralove "to the use of" the insurance company. Respondent moved to strike the declaration for misjoinder of parties plaintiff and causes of action. The trial court sustained the motion on the first ground, and, as petitioners elected to stand on the declaration, gave judgment for the respondent, which the Court of Appeals affirmed, 61 App. D. C. 74; 57 F. (2d) 440. This Court granted certiorari.

Both courts below ruled that the administratrix is, by the terms of the District death act (23 Stat. 307; D. C. Code [1924], §§ 1301, 1302, 1303), the only proper plaintiff in an action for wrongful death, and that the Compensation Act, though it assigns the cause of action for the death, to the employer, upon acceptance of the award, does not, under the common-law practice prevailing in the District, permit him to bring the suit in his own name. The trial court further expressed the view that the insurer was without any interest in the litigation, by way of subrogation, since the cause of action for wrongful death is not assignable at common law, and the Compensation Act confers on the insurer no rights analogous to those given the employer. The question before us is whether the Court of Appeals was right, and, if not, whether the proper parties have been designated as plaintiffs.

Sections 7, 8 and 9 of the Compensation Act provide for compensation to the employee if he is injured, or to certain of his dependents, if he is killed, in the course of his employment. Section 33 (a) provides that "if on account of a disability or death for which compensation is payable . . . the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect . . . to receive such compensation or to recover damages against such third person." By subsection (b) "Acceptance of such compen-

sation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person," and by subsection (d) the "employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person."

But the cause of action against a third party which is thus cast upon the employer is not to be maintained exclusively for his own benefit. From the proceeds of the litigation or compromise the employer is directed by § 33 (e) to retain an amount equal to his disbursements in securing them, the cost of benefits furnished by him to the employee, amounts paid as compensation, and the present value of all amounts which it is estimated are payable as such. The latter sum is to be held by the employer "as a trust fund to pay such compensation as it becomes due and to pay any sum in excess of such compensation to the person entitled to such compensation or to the representative." Any amount recovered above that required for these purposes is to be paid by the employer directly "to the person entitled to compensation or to the representative."

In the case where the employee survives and accepts compensation as the only person entitled, it is clear that the statutory assignment vests in the employer the full right to recover damages from the third person. Double recovery by the employee, compare *Mercer v. Ott*, 78 W. Va. 629; 89 S. E. 952; *Fox v. Dallas Hotel Co.*, 111 Tex. 461; 240 S. W. 517, is thus avoided. Yet the employer is permitted to share in the recovery only to the extent of his own liability, compare *Travelers Insurance Co. v. Brass Goods Mfg. Co.*, 239 N. Y. 273; 146 N. E. 377, and any excess goes to the injured employee.

In this case the injury resulted in death of the employee, and the election to take compensation was made by the widow. As she is both the administratrix and the only

person entitled to compensation, the election was validly exercised and we need not resolve possible doubts as to the proper person to make the election under other circumstances. Compare §§ 33 (a) and 33 (b) with § 33 (f). Her election has called into operation the statutory assignment so far as it applies to the action for wrongful death. We must decide its effect on that cause of action.

The statute is not free from ambiguity. The right to recover for a wrongful death is the creature, not of the common law, but of a statute which confers the right on the personal representative of the deceased for the benefit of his next of kin under the local statute of distribution, some of whom may not be entitled to compensation under the Compensation Act. Nevertheless, § 33 (b) of the Act provides that it is the "right of the person entitled to compensation to recover damages against such third person" which is assigned to the employer by the election to take compensation. Reading this provision literally and alone, the employer, in the case of the wrongful death of his employee, would take nothing by the assignment which it purports to effect, since the person entitled to the compensation has no right to recover for the death. But § 33 (d) authorizes the employer to institute suit or to compromise the claim, and §§ 33 (e) (1) (c) and 33 (e) (2) provide that any recovery in excess of the sums required to reimburse the employer and allow for compensation payable by him is to be paid to the representative of the deceased. Having regard to these provisions and to the general purpose which the act discloses with respect to rights of recovery when the injury does not result in death, we see no escape from the conclusion that the statute contemplates that the employer is to have the same control over the institution of an action for wrongful death, the compromise and settlement of the claim, and the distribution of the proceeds, as he is given in unambiguous language in the case where the injury results only

in disability. What is made explicit by the statute with respect to the latter is implicit with respect to the former. For if it had been intended that the employer should assert only a part of the action for wrongful death, proportionate to the interest of those who are dependents under the Compensation Act, compare *Matter of Zirpola v. Casselman*, 237 N. Y. 367; 143 N. E. 222; *U. S. Fidelity & Guaranty Co. v. Graham & Norton Co.*, 254 N. Y. 50; 171 N. E. 903, there would be no meaning to the language of § 33 (2) directing him to pay to the personal representative from the proceeds of the action any excess over the compensation award.

Concluding that where the employer is given anything to recover it is the full recovery provided by the wrongful death act, we do not think, as did the courts below, that the rights thus conferred may be enforced only by an action brought in the name of the personal representative. It is true that the statute does not expressly say that the employer may bring the action in his own name, and that by the common law the assignee must, in general, sue in the name of the assignor. *Glenn v. Marbury*, 145 U. S. 499. This rule, a vestige of the common law's reluctance to admit that a chose in action may be assigned, is today but a formality which has been widely abolished by legislation. We see no reason for thinking that a statute passed in 1928 and clearly intended to effect a complete transfer of the cause of action, should be interpreted to perpetuate that formality. There is nothing in its language, history or purpose to indicate that the word "assignment" was used as anything other than a convenient description of the transfer to the employer of the rights of the employee or his representative, or that it is to be read in the common law sense, merely because the forum for the enforcement of those rights has not departed from

the common law form in the case of voluntary assignments.

It is immaterial whether the statutory assignment is said to create a new cause of action in the employer or merely to permit him to enforce that previously vested in the employee or his personal representative. What is material is that the employer acquires the legal rights of the employee or the personal representative, subject to the qualifications imposed by the common law or the death statute to the extent that they are not inconsistent with the provisions of the Compensation Act. The Compensation Act permits him to enforce them in his own name.

We do not doubt, although other courts have, *Henderson Tel. & Tel. Co. v. Owensboro Home Tel. & Tel. Co.*, 192 Ky. 322; 233 S. W. 743; *Hartford Accident & Indemnity Co. v. Englander*, 93 N. J. Eq. 188; 118 Atl. 628, that the insurer is subrogated to the rights of the employer to the extent that it has discharged his duties, though whether its rights extend to compensation which it is liable to pay, as well as to that which it has paid, we need not decide.² Notwithstanding, the provision of the statute and of the policy permitting an award for compensation to be made against the insurer directly, the function of the insurer is essentially that of indemnifying the employer. The statute contemplates that the payment of compensa-

² The policy of insurance provides (Clause K) that "the Company shall be subrogated in case of any payment under this Policy, to the extent of such payment, to all rights of recovery therefor vested by law either in this Employer or, in any employee or his dependents claiming hereunder, against persons, corporations, associations or estates." The insurer is subrogated to the employer's rights to no greater extent under this express provision than it would be without it by operation of law; whether its rights may be limited by it, we have no occasion to consider.

tion should be secured by insurance, and nothing in it indicates that the insurer is to be denied an indemnitor's rights. Subrogation is a normal incident of indemnity insurance. *Hall & Long v. Railroad Companies*, 13 Wall. 367; *Liverpool & Great Western Steam Co. v. Phenix Insurance Co.*, 129 U. S. 397, 462; *St. Louis Iron Mountain & Southern Ry. Co. v. Commercial Union Insurance Co.*, 139 U. S. 223, 235; *Travelers Insurance Co. v. Great Lakes Engineering Co.*, 184 Fed. 426; *Workmen's Compensation Exchange v. Chicago, M., St. P. & P. R. Co.*, 45 F. (2d) 885.

The suggestion of the trial court that subrogation is precluded here by the non-assignability, under the death act and the common law, of the administratrix's cause of action for death, is without force. Considerations of policy which may forbid the voluntary assignment of the cause of action are obviously inapplicable to a case where the statute does assign the action to the employer in order to carry out the plan of the Compensation Act. That plan would be destroyed if the insurance company were denied the right of subrogation. For the consequence would be to permit that double recovery by either the employer or the next of kin entitled to compensation which the statute is careful to avoid, with a resulting increase in the cost of the insurance which the statute requires.

The insurer's right of subrogation does not alter the fact that it is the employer who is directed by the statute to distribute the proceeds of the recovery, in which the insurer has only a partial interest. Accordingly, the employer is the party to bring the action and the only necessary party plaintiff in the case before us.³ But the insur-

³ Under the common law practice rights acquired by subrogation were asserted in an action at law in the name of the insured to the insurer's use, *Hall & Long v. Railroad Companies*, 13 Wall. 367; *United States v. American Tobacco Co.*, 166 U. S. 468, 474, though in equity, *Garrison v. Memphis Ins. Co.*, 19 How. 312, and admiralty,

ance company and the widow, both in her own right and as administratrix, are interested in the recovery. Under the common law practice, the defendant may not complain if the employer indicates their beneficial interests by bringing the action to their use as well as to his own. See *Southern Ry. Co. v. Carter*, 139 Ga. 236, 238; 77 S. E. 21; *Pearce v. Twichell*, 41 Miss. 344, 346; *Atkins v. Moore*, 82 Ill. 240, 241; compare *Roof v. Chattanooga Wood Split Pulley Co.*, 36 Fla. 284, 293; 18 So. 597. Whether, under Equity Rule 13 of the Supreme Court of the District of Columbia, made applicable to actions at law by the first paragraph of the law rules, they may join with him as legal plaintiffs since they have "an interest . . . in obtaining the relief demanded," we do not decide. The decision does not depend upon the federal statute, but upon the local rule, and may be conditioned by unwritten practices which we should hesitate to disturb. Nor do we consider what would be the rights of the person entitled to compensation or the personal representative, compare *Hunt v. Bank Line*, 35 F. (2d) 136; or the insurer, see *Norwich Insurance Co. v. Standard Oil Co.*, 59 Fed. 984; *Continental Insurance Co. v. Loud & Sons Lumber Co.*, 93 Mich. 139; 53 N. W. 394; *U. S. Fidelity & Guaranty*

Liverpool & Great Western Steam Co. v. Phenix Insurance Co., 129 U. S. 397, 462, the insurer might sue in its own name. We need not consider the effect upon the common law rule of Equity Rule 13 of the Supreme Court of the District of Columbia (made applicable to actions at law by Law Rules, ¶ 1) providing that all actions "shall be prosecuted in the name of the real party in interest," in a case where the insurer succeeds by subrogation to the entire cause of action of the insured against the party primarily responsible for the loss. Cf. *Travelers Insurance Co. v. Great Lakes Engineering Co.*, 184 Fed. 426. Such was not the case here. Compare *Norwich Insurance Co. v. Standard Oil Co.*, 59 Fed. 984; *Continental Insurance Co. v. Loud & Sons Lumber Co.*, 93 Mich. 139; 53 N. W. 394; *U. S. Fidelity & Guaranty Co. v. Graham & Norton Co.*, 254 N. Y. 50, 54-55; 171 N. E. 903.

Co. v. Graham & Norton Co., *supra*, 54-55; 171 N. E. 903; compare *Ocean Accident & Guarantee Corp. v. Hooker Electrochemical Co.*, 240 N. Y. 37; 147 N. E. 351; *Aetna Casualty & Surety Co. v. Phoenix Nat. Bank & Trust Co.*, 285 U. S. 209, 214, in a case where the employer refused to coöperate in the prosecution of the action.

Since the ruling below that the action could only be brought in the name of the personal representative was erroneous, petitioners' failure to amend in conformity to that ruling will not preclude amendment now. Judgment will be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* ALUMINUM GOODS MANUFACTURING CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 192. Argued December 13, 14, 1932.—Decided January 9, 1933.

1. The purpose of requiring consolidated returns by affiliated corporations was to impose the war profits tax according to true net income and invested capital of what was, in practical effect, a single business enterprise, even though conducted by means of more than one corporation. P. 547.
2. Primarily, the consolidated return was to preclude reduction of the total tax payable by the business, viewed as a unit, by redistribution of income or capital among the component corporations by means of intercompany transactions. *Id.*
3. A manufacturing corporation bought all the shares of another corporation and used it as its subsidiary for selling the goods manufactured. The subsidiary, after netting losses in several years preceding 1917, was liquidated in that year, and in the year next following dissolved. *Held* that the two corporations did not cease to be "affiliated" during the year 1917 (Rev. Act 1921, § 1331; Treas. Reg. 41, Arts. 77 and 78), and that in making up their consolidated return of excess profits for that year, the loss of the