[HIGH COURT OF AUSTRALIA.]

THE EQUITABLE LIFE ASSURANCE OF THE UNITED STATES
DEFENDANTS, . . APPELLANTS;

AND

MARIA BOGIE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *Dec.* 6, 7, 8, 9.

Griffith C.J., Barton and O'Connor JJ.

Life assurance—Policy—Surrender value—Loan value—Forfeiture on non-payment of premium—Contracting out of benefit conferred by Statute—Life Assurance Companies Act 1901 (*Queensland*) (1 *Edw. VII. No.* 20), *sec.* 22.

A policy of life assurance, issued by the appellants to one Bogie, contained a condition of forfeiture on non-payment of premiums when due and also the following provision :—"This policy shall lapse and together with all premiums paid thereon shall forfeit to the Society on the non-payment of any premium when due ; excepting that upon due surrender of this policy within six months after said lapse providing premiums have been duly paid for at least three full years of assurance, the Society will give the assured the choice of either a cash value or non-participating paid-up life policy, at the date of lapse, as fixed in the following table of surrender values. . . . In consideration of the premises, it is understood and agreed that all right or claim for temporary assurance or any other surrender value than that provided in this contract is hereby waived and relinquished whether required by the Statute of any State or not." It contained also a further provision that "in consideration of the premises . . . all right or claim for temporary assurance, or any other surrender value than that provided in this contract is hereby waived and relinquished, whether required by the Statute of any State or not."

Section 22 of the *Life Assurance Companies Act* 1901 provides that no policy shall be forfeited for non-payment of premiums, so long as the premiums and interest in arrear are not in excess of the surrender value. Negotiations were commenced before the due date of a certain premium and continued till

after that date, resulting in an agreement that the Society should lend £29 10s. on the security of the policy, and that the Society should retain thereout a certain sum in payment of the premiums in arrear, and thus keep the policy on foot. The assured executed an assignment of the policy to the Society; but they refused to grant the loan until Bogie's title to the policy, which had been previously assigned by him, had been cleared. Meanwhile Bogie died, but his title was subsequently cleared.

Held that, under the circumstances, there was no such default made within the terms and conditions of the policy as to cause a lapse.

Held, further, that the policy was subject to the provisions of sec. 22 of the *Life Assurance Companies Act* 1901, and therefore did not become forfeited for non-payment of premiums, so long as the premiums and interest in arrear were not, at the time, in excess of the surrender value.

Held, further, that the provisions of sec. 22 of the *Life Assurance Companies Act* 1901 were not excluded by the terms of the contract in question, for the reasons (1) that the Act was not in existence at the time the contract was made, and (2) that the legislature intended, in the interests of the general public, that the protection given by the section in question was to be absolute and incapable of being bargained away.

THIS was an action brought by the plaintiff, as administratrix with the will annexed of one Joseph Dickson Bogie for the recovery of £500, the proceeds of a policy of life assurance taken out by him in the appellant Society. The policy, dated 28th November 1900, contained a provision that "the loans, surrender values, bonus guarantee options, privileges and conditions stated on the 2nd and 3rd pages hereof form a part of this contract. . . . ." The second page contained, *inter alia*, the following provisions :—

"V. SURRENDER VALUES.

"This policy shall lapse and together with all premiums paid thereon shall forfeit to the Society on the non-payment of any premium when due; excepting that upon due surrender of this policy within six months after said lapse providing premiums have been duly paid for at least three full years of assurance, the Society will give the assured the choice of either a cash value or non-participating paid-up life policy, at the date of lapse, as fixed in the following table of surrender values. . . . In consideration of the premises, it is understood and agreed that all right or claim for temporary assurance or any other surrender value than

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that provided in this contract is hereby waived and relinquished whether required by the Statute of any State or not.

"VI. LOANS.

"After this policy shall have been in force three years the Society will thereupon or upon any subsequent anniversary of the assurance, loan hereon under the terms of the Society's loan agreement then in use, a sum or sums the total of which shall not exceed the loan value of the policy as specified . . . . upon condition that at the time of making such loan, the policy shall be duly assigned to the Society as collateral security for such loan; . . . " &c.

Then followed a table headed "Table of Loans and of Surrender Values."

On 3rd May 1904, correspondence was instituted by Bogie with the Society relating to the granting by the latter of a loan on the security of the policy. Bogie was informed by the Society that the loan value of his policy was £29, subject to payment thereout of arrears of premiums due on 28th May and August 1904, each amounting to £6 16s. 5d. On 21st June 1904, an agreement for a loan of £29 subject to the above conditions was made between the parties, the Society undertaking to keep the policy on foot by deducting from the amount of the loan a sum sufficient for the payment of the premiums and interest in arrear. The Society then called upon Bogie to clear his title to the policy which had been previously mortgaged. Bogie died on 30th August 1904, without having redeemed the mortgage, and administration of his estate was granted to the respondent, who subsequently cleared the title. The action was tried before *Power* J. without a jury, and on 5th June 1905, judgment was given for respondent for £527 10s.

Lilley (with him *Shand*), for the appellants. The policy lapsed at the latest on the 27th June, owing to non-payment of the premium due on 28th May. It is alleged that the appellants agreed to grant respondent a loan of £29 upon the security of the policy, part of which sum was to be applied in payment of the premium then due. Before the Society could make such an advance, the policy had to be assigned to them. This

could not be done at the time, as it was already mortgaged and stood in the name of another person. During his lifetime Bogie accepted the situation and never claimed to be entitled to the loan unless he cleared his title. It was understood between the parties that the loan would not be made until the title was cleared. This may be gathered from the correspondence following on the memorandum of agreement: *Bristol, Cardiff and Swansea Aerated Bread Co.* v. *Maggs* (1); and in every agreement for a mortgage there is an implied term that the mortgagor will give a good title. The express agreement here was that he would clear the policy within a reasonable time, and certainly before his death. His executors, therefore, could not claim to be entitled to pay up the premiums and get the full benefit of the policy.

[O'CONNOR J.—The contract for a loan on the security of the policy was a contract complete in itself, and was made with notice on both sides that the policy was assigned.]

As soon as the Society became aware of the assignment they asked Bogie to clear his title, and Bogie undertook to do so.

[O'CONNOR J.—But was not all that happened subsequently a mere matter of conveyancing?]

Sec. 22 of the *Life Assurance Companies Act* 1901, providing that no lapse shall take place for non-payment of premiums so long as the arrears of premiums are not in excess of the surrender value, is a provision in favour of the assured which he can waive or commute in any way he chooses. Instead of keeping the original policy on foot, he may take out one of another value, or on due surrender he may get the surrender value.

[GRIFFITH C.J.—The question now is whether or not there is a surrender value. *Primâ facie* there is. How do you say it has been lost?]

Under condition V. of the policy, the assured has contracted himself out of it. Condition V. provides for the conditional payment of cash values or the granting of non-participating paid-up life policies at the date of lapse of the policy "as fixed in the . . . table of surrender values" and for waiver by the assured of all right or claim for temporary assurance or any other surrender

(1) 44 Ch. D., 616.

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value than that provided in this contract whether required by the Statute of any State or not. This policy was made before the passing of the *Life Assurance Companies Act* 1901. This is legislation for the benefit of the assured, and he can contract himself out of it: *Caffery* v. *John Hancock Mutual Life Insurance Co.* (1); *Equitable Life Assurance Society* v. *Clements* (2). The reason for the different decision in the latter case is that the legislature, between the dates of the two decisions, enacted that "if the assured dies within the term of the temporary insurance, the company shall be bound to pay the amount of the policy, the same as if there had been no default in payment of the premiums, anything in the policy to the contrary notwithstanding": *Johansen* v. *City Mutual Life Assurance Society* (3).

In considering whether a contract is against public policy, regard must be had, not to its effect upon a small number of individuals, but upon the public at large: *Griffiths* v. *The Earl of Dudley* (4).

[On the question of the power to waive a statutory right, he cited *Goldsmid* v. *Great Eastern Railway Co.* (5).]

The provisions of sec. 52 are distinctly favourable to the view that the assured has a right to waive the benefit of section 22. The legislature can hardly be said to be altering a contract perforce wherein the assured has a special benefit. The rate of premium might have been higher if this condition of section 22 was to be included in the policy contract. It would require the very strongest language to lead to the conclusion that the Act is retrospective.

Ryan (with him *Walsh*), for the respondent. The Society admits the surrender value of the policy was £20. While that £20 remains in the hands of the Society they were bound to carry on the policy.

[O'CONNOR J.—The appellants contend that by the last lines of condition V. they have contracted themselves out of sec. 22.]

Sec. 22 was directed against forfeitures: *Glasgow, Magistrates of*, v. *Police Commissioners of Hillhead* (6); *Wall* v. *Equitable*

(1) 27 Fed. Rep., 25.
(2) 140 U.S., 226.
(3) (1904) Q.S.R., 288; 2 C.L.R., 186.
(4) 9 Q.B.D., 357, at p. 363, *per Field* J.
(5) 25 Ch. D., 511.
(6) 12 Rettie, 872.

Life Assurance Society (1); *Equitable Life Assurance* v. *Clements* (2); *Mutual Life Insurance Society of New York* v. *Cohen* (3). A man cannot contract himself out of the benefit of future Statutes. Even though it is possible to contract out of the Act, this contract was made before the Act was passed, and could not therefore have had that object. People in general must always be considered as contracting with reference to the law as existing at the time of the contract: *Mayor &c. of Berwick* v. *Oswald* (4); *Baily* v. *De Crespigny* (5); *Netherseal Colliery Co.* v. *Bourne* (6). If the aim of this section is to prevent forfeiture, the respondent is right within the provision of the legislature. If condition V. means that the policy automatically lapses immediately on default in payment of a premium, there would be no surrender value at all: *The Duke of Devonshire* v. *The Barrow Hæmatite Steel Co.* (7); *Page* v. *Bennett* (8). In *Griffiths* v. *Earl of Dudley* (9), the plaintiff waived the benefit of a section which provided that under certain circumstances the relation of employer and workman should be deemed not to exist. That is a different case from this in which the Statute prohibits the waiver of the right in question: *Goldsmid* v. *Great Eastern Railway Co.* (10), being a case where the question arose in respect of a charter granted to the whole of the people of London, involved an entirely different principle from the present case: *Reilly* v. *Franklin Insurance Co. of St. Louis* (11); *Griffith* v. *New York Life Assurance Co.* (12). The negotiations between Bogie and appellants for the loan bring the case exactly within the benefit of the rule laid down in *Hughes* v. *Metropolitan Railway Co.* (13). There was a completed contract for the payment of £29 10s. on the policy, and by virtue of that the policy was kept on foot. There was also an estoppel against the Society by their representation that the policy was still valid and subsisting. The Courts lean strongly against the forfeiture of a policy for non-payment of premiums: *Cotten* v. *Fidelity and*

(1) 32 Fed. Rep., 273.
(2) 140 U.S., 226.
(3) 179 U.S., 262.
(4) 3 E. & B., 653, at p. 665, *per Maule* J.
(5) L.R. 4 Q.B., 180, at p. 186, *per Hannen* J.
(6) 14 App. Cas., 228.
(7) 2 Q.B.D., 286.
(8) 2 Giff., 117.
(9) 9 Q.B.D., 357.
(10) 25 Ch. D., 511.
(11) 28 Amer. Rep., 552.
(12) 40 Amer. St. Rep., 96.
(13) 2 App. Cas., 439, at p. 448, *per* Lord *Cairns* L.C.

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Casualty Co. (1); *Insurance Co.* v. *Norton* (2); *Insurance Co.* v. *Eggleston* (3). Before the company could cut off negotiations and treat the policy as lapsed they would have to give reasonable notice to Bogie: *Hatten* v. *Russell* (4). Other instances, where policies remain in force even though premiums are in default, are *Tennant* v. *Travellers' Insurance Co.* (5); *Lebanon Mutual Insurance Co.* v. *Hoover* (6); *Miller* v. *Life Insurance Co.* (7); *Stuart* v. *Freeman* (8); *Bristol, Cardiff and Swansea Aërated Bread Co.* v. *Maggs* (9).

Lilley, in reply. The agreement with the Society was for a loan on the giving of the proper legal security. [He referred to *Egerton* v. *Earl Brownlow* (10).]

Cur adv. vult.

Dec. 9.

GRIFFITH C.J. This is an action brought by the personal representative of Joseph Dickson Bogie against the appellants for the recovery of the amount of a life policy effected by Bogie in his lifetime. The plaintiff's title to the policy is not in dispute. The defence was that, by a term in the policy, the policy was to lapse on the non-payment of a premium when due; and it is alleged that, on 28th May 1904, a premium became due, and default was made in the payment of it, whereupon the policy lapsed and became forfeited. In answer to that defence, the plaintiff sets up what is called estoppel or waiver in three ways. She says first, that the premium, as to which Bogie made default in payment, was duly paid by him, or appropriated by the defendants from the proceeds of a loan from defendants to Bogie about the date that the premium became due. Then she says that the defendants were estopped from alleging that default was made by reason of an agreement, which she says was made between the parties, and she relies practically upon the same facts, saying that the payment of the premium was waived and excused by the defendants. She also relies upon a provision of

(1) 41 Fed. Rep., 506.
(2) 96 U.S., 234, at p. 242.
(3) 96 U.S., 572, at p. 578.
(4) 38 Ch. D., 334.
(5) 31 Fed. Rep., 322.
(6) 57 Amer. Rep., 511.
(7) 12 Wall., 285.
(8) (1903) 1 K.B., 47.
(9) 44 Ch. D., 619.
(10) 4 H.L.C., 1.

the *Life Assurance Companies Act* 1901, to which I will refer afterwards. Now, there is no doubt a premium became due on 28th May. There is no doubt, also, that it was the practice of the Society, and, indeed, part of the terms of the policy, that 30 days' grace should be allowed, which expired on 27th June, and the premium was not paid then; but it also appeared that by correspondence instituted before the premium became due, and continued until after that time had expired, an arrangement, or at least, negotiations had been entered into between the assured and the Society for a loan. By the policy itself it was provided (by condition VI.):—"After this policy shall have been in force three years, the Society will thereupon, or upon any subsequent anniversary of the assurance, loan hereon, under the terms of the Society's loan agreement then in use, a sum or sums the total of which shall not exceed the loan value of the policy as specified in the table on page 3 hereof, upon condition that, at the time of making such loan, the policy shall be duly assigned to the Society as collateral security for such loan, and that 5 per cent. interest on said loan, and the full premium of one year shall be paid in advance." The assured, therefore, was entitled, under the terms of the policy, to borrow one or more sums of money, not exceeding in all the loan value of the policy, as specified in the policy itself, which in this particular instance amounted to £29 10s. That is the maximum amount—whether the assured could claim that maximum, or any sum not exceeding the amount specified, is immaterial, because, in this case, he asked the company what amount they would lend him, and the answer that he received from their authorized agent was £29 10s. As soon, therefore, as this request had been made and the amount fixed, there was a binding contract between the parties to lend him that sum of money. It was part of the terms of the loan that the £29 10s. should be applied in payment of the premium due on 28th May, and also of the next succeeding premium, and that the balance only should be paid to him. Therefore, it would appear to be clear that there was a binding contract on the part of the Society to pay these premiums themselves, or, rather, to appropriate some of the money, which they were by their contract so to pay to the assured, in payment of the premiums that he

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was bound to pay to them. Under these circumstances, in my opinion, the Society cannot be heard to say that there has been any default made, and I should be inclined to hold, viewing the matter in that way, that the contract that the policy should lapse on the non-payment of a premium, was varied by a subsequent contract for valuable consideration, that the policy should not lapse on the failure to pay that particular premium on the due date, but that, on the contrary, the Society would apply some of the money that they were bound to advance to the assured, in payment of the premiums. An exact authority for that proposition is found in the case of *Hughes* v. *The Metropolitan Railway Co.* (1). I will read a passage from the judgment of Lord *Cairns* L.C.: That was a case for the forfeiture of a lease for non-compliance with a notice to effect repairs. After notice was given there were negotiations which might have reasonably led the lessee to suppose that the notice was in abeyance. His Lordship said:—"It was not argued at your Lordships' Bar, and it could not be argued, that there was any right of a Court of Equity, or any practice of a Court of Equity, to give relief in cases of this kind, by way of mercy, or by way merely of saving property from forfeiture, but it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties." *A fortiori*, if the negotiations resulted in a distinct binding agreement, as appears in the present case; but to that it is said by the appellants that the agreement was conditional, and the loan was only to be made on the assignment of the policy. The facts on that were these:—The assured executed an assignment of the policy to the company in the form that they used, and which had been

(1) 2 App. Cas., 439, at p. 448.

sent to him for the purpose. It is said that that assignment was not good, because, some years before, the assured had assigned the policy to some persons as collateral security for a debt due by somebody else, that that assignment had been recorded in the company's books, and there was nothing to show that the rights under the policy were not still vested in these assignees. As a matter of fact, that assignment had become inoperative. It was an assignment by way of mortgage, and the trustees under it had no claim to the policy. Bogie's assignment, therefore, to the Society, as a matter of fact did assign to the Society all his rights in the policy, although there appeared on the Society's books a notification that somebody else might have a claim to it. When this was discovered by the Society, they pointed out to him that they could not give him the actual cash until his title was cleared, and before that was done he died. It was afterwards cleared, and there is no question raised that his administratrix is not entitled to the benefit of the policy if it continued in force. The doctrines applicable to that state of circumstances seem to be these:—The contract was one for valuable consideration relating to specific property of such a nature that a Court of Equity would have entertained a suit for the specific performance of it; and if the assured in his lifetime had sued to enforce that contract, he could have claimed a declaration that the policy was a valid and subsisting one, if, when he brought an action of that sort, the Society had then disputed it. In such an action it would, no doubt, have been essential, before he could get final judgment, to give a valid assignment to the Society, and it would have been necessary for him to show that he had a good title; but in the giving of that proof, time would not have been of the essence of the contract, and a Court of Equity would not have allowed his claim to be defeated by the Society showing that there was apparently an outstanding blot on the title. According to the doctrines of the Court of Equity that would have been treated as a matter of conveyancing. In my opinion, then, this was a binding contract capable of being enforced in a Court of Equity, and the objection to it is merely what a Court of Equity calls a matter of conveyancing, and not a condition, and there would be no answer to such a suit in the face of a contract of that sort. I

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think it cannot be asserted that there was a default made within the terms and conditions of the policy which has caused a lapse. In one sense, that might be properly described as a case of estoppel, though I prefer not to use that term. The term waiver, I am inclined to think, is not the right term to use either. In the case of *Hughes* v. *The Metropolitan Railway Co.* (1), *Blackburn* L.J. quoted a passage from *Mellish* J. He said :—" But even if the plaintiff himself did not intend to abandon the notice, yet, if his conduct was such as to put the defendants off their guard, and to lead them to believe that the six months' notice would not be insisted on, there is ground for giving relief in equity. The result of waiver is different, for the notice is gone at law, whereas Courts of Equity, though they relieve against the forfeiture, will still compel the lessee to put the house into substantial repair, and will give the landlord all that he is really entitled to, only preventing him from enforcing a forfeiture that would be inequitable." But in any event, in this case, there was a clear equitable answer to the original lapse or forfeiture of the policy.

That itself is sufficient to dispose of the case, but another point was raised, and we were pressed to give an opinion upon the subject, and I think it is right that we should give an expression of our opinion. That was with regard to the effect of sec. 22 of the *Life Assurance Companies Act.* That Act was passed after the date of this policy. The section provides :—" No policy issued by a Company shall lapse to the Company for non-payment of premiums so long as the premiums and interest in arrears are not in excess of the surrender value as calculated in accordance with the answer to the ninth question contained in the statement as prepared by the Company in the form of the Eighth Schedule to this Act." The eighth schedule contains the form of statements which, by sec. 13, are required to be made by the Company, after other investigation of its financial condition has been made. This has to be done once every five years, or at such shorter intervals as may be prescribed by the constitution of the company. Sec. 13 says :—" Every Company shall, on or before the thirty-first day of December, one thousand nine hundred and three, and thereafter within nine months after the date of each such investigation as

(1) 2 App. Cas., 439, at p. 452.

aforesaid into its financial condition, prepare a statement of its life assurance and annuity business in the form contained in the Eighth Schedule to this Act." The statement must contain, *inter alia*, an answer to question 9 of the eighth schedule of the Act, namely, "a table of minimum values (if any) allowed for the surrender of policies for the whole term of life." By sec. 52 of the Act, it is declared that the provisions of the Act extend and apply to all companies and to all policies and contracts for life assurance, endowments and annuities, heretofore granted or made, or hereafter to be granted or made, whether they are subject to the provisions of any particular or special Statute or otherwise. The first question is whether this policy falls within the terms of that section. The words of the schedule are:—"A table of minimum values (if any) allowed for the surrender of policies for the whole term of life, and for endowments, and endowment assurances, or a statement of the method pursued in calculating such surrender values, with instances of its application to policies of different standing, and taken out at various interval ages, from the youngest to the oldest." A company is not bound to give a surrender value at all. It is well known that the old insurance companies did not grant surrender values. The policies frequently contained a rigid condition that, upon the non-payment of a premium, the policy should lapse, and there was an end of it. In later years, however, many of the companies granted what they called surrender values, which was a short term to express a scheme by which the assured was credited with some pecuniary value, in consideration of the premiums that had been received, and, according to the rules of the companies, fixed for themselves, in competition with one another. The benefit of and the amount of this surrender value vary, and it was, in the case of some of the companies (not all), provided that when the policy was overdue, the company would apply this surrender value to keeping up the premiums. But the legislature in 1901 thought fit to say that no policy should lapse, so long as the premiums and interest in arrears are not in excess of the surrender value. The first question, then, is whether in this case there is a surrender value. The Society say that they do not grant a surrender value under the terms of their policy within the meaning of the sec. 22. The

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section clearly does not make it obligatory on the Society to grant a surrender value, but the form of the table mentioned in question 9 is "a table of minimum value (if any) allowed for the surrender of policies for the whole term of life." Condition V. of the policy is headed "Surrender Values," and it is also the lapsing condition: "This policy shall lapse and together with all premiums paid thereon shall forfeit to the Society on the non-payment of any premium when due; excepting that upon due surrender of this policy within six months after the said lapse providing premiums have been duly paid for at least three years of assurance, the Society will give the assured the choice of either a cash value or non-participating paid-up life policy, at the date of lapse, as fixed in the following table of surrender values." No doubt that condition does not say in plain words that every policy shall have a surrender value which the assured may at any time apply for and obtain at his option, but it does provide for a surrender value which may be claimed within six months after forfeiture. On the first page of the policy there is the statement:—"The loans, surrender values, bonus guarantee options, privileges and conditions stated on the second and third pages thereof form a part of this contract, as fully as if recited at length over the signatures hereto annexed." The second page begins:—"Privileges and Conditions," amongst which is condition V. On the third page is a "Table of Loans and of Surrender Values." The first column is headed—"Loan at 5% Interest," and there is a footnote "loans granted subject to terms of paragraph VI. of privileges and conditions, page 2," which I have read. The next column is headed—"Cash Value," and there is no note attaching any condition to it. The proper construction of the policy, it seems to me, is that there is an unconditional promise by the Society that the assured may, at any time after three years, at his own option declared within six months after lapse, claim the entire cash value set out in the table. That is, I think, a table of minimum values allowed for the surrender of a policy within the meaning of question 9 of the eighth schedule of the *Life Assurance Companies Act*. Sec. 22, therefore, in my opinion, applies to this policy.

Then another question is raised. The same condition—condition

V., which I have partly read—concludes with these words :—"In consideration of the premises, it is understood and agreed that all right or claim for temporary assurance or any other surrender value than that provided in this contract is hereby waived and relinquished whether required by the Statute of any State or not." Temporary assurance, as appears from some of the American cases, is an expression used there, representing the protection that is granted during what is called the exhaustion of the surrender value, and this condition was framed to exclude any provision of that sort. There is no doubt that that was the object of the provision. "In consideration of the premises"—that is, the right to claim the surrender value under certain conditions, namely, by claiming it within six months after the policy has lapsed—"any right to temporary insurance," that is, to have the policy kept in force during the exhaustion of the surrender value—"or any other surrender value than that provided in this contract is hereby waived and relinquished whether required by the Statute of any State or not." In some of the American States, at least, there have been Statutes granting such a temporary insurance, and I will assume, therefore, that that express provision is in terms sufficient to include the operation of sec. 22, or rather, that it operates as an express stipulation that, instead of the privileges granted by sec. 22, the assured shall have the privileges granted by this Society, and nothing else. If that is so, and if the stipulation is valid, the provisions of sec. 22 do not apply to the case. It is said, however, that this is a condition imposed by the legislature that cannot be waived by the parties. There are two difficulties in the way of waiving it. The first is that this contract was made before the Act was passed, and therefore cannot be construed as having reference to a provision which was passed subsequently. The words "whether required by the Statute of any State or not," cannot, in my opinion, be held to meet, or to refer to, any future law that may be passed by the legislature of Queensland for the benefit of assured persons. Leaving that out of consideration, the question arises whether the provisions of sec. 22 of the *Life Assurance Companies Act* are capable of being waived, and that is a question of very general importance. In considering

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that question, it is necessary to have regard to the objects of the legislature in passing the Act. Up to the passing of this Act there was practically no control over life assurance companies. Any company could come to Queensland and carry on business. It might have no assets, and it might be insolvent; but, solvent or insolvent, there was practically no protection for persons entering into any contract with it. When I say could come to Queensland, I mean foreign companies could come, or a company might be established, without any realizable assets at all. I remember an instance of that sort coming under my notice when I was on the Queensland Bench. It is, therefore, provided that every insurance company carrying on business must deposit with the Treasurer £10,000 in cash or securities, and must make periodical returns. Companies were at liberty to come on those conditions, or to stay away. It is further provided by sec. 17 that they shall not be allowed to carry on business until they have been duly registered under the *British Companies Act* 1870, or the *Foreign Companies Act* 1895, and then it is provided by sec. 22 that policies shall not lapse for non-payment of premiums as long as the surrender value is not exhausted. Under the law, as it stood before, a great number of policies used to lapse for non-payment of premiums. This was recognized to be a great hardship, and the legislature thought fit to say:—"We will regulate insurance companies. If they choose to carry on business in this State they shall do so on these terms; and we will not allow this particular form of provident provision for the future to be destroyed by the mere non-payment of an instalment at a particular time. Those are the conditions under which we will allow companies to do business in Queensland." I think a law of that sort lays down a rule of public policy, and that it would be making the law nugatory if a stipulation in a policy inconsistent with it were allowed to prevail over it, so that the parties could contract themselves out of the section. I suppose a company might frame its policies in such a way as to escape the operation of the section altogether. For instance, suppose there were a simple provision that upon the non-payment of a premium the policy shall lapse, and there were no provision for any surrender value, the section would not apply.

But a stipulation that, notwithstanding sec. 22 of the *Life Insurance Companies Act*, the policy shall lapse for non-payment of premiums, notwithstanding the existence of a surrender value, would, it seems to me, be in direct conflict with the intention of the legislature as declared by the Act. I have, therefore, come to the conclusion that this is a provision that cannot be waived. It is a provision not solely for the benefit of the assured; it was considered by the legislature to be an important condition, which ought to attach to all such contracts for the future. I am of opinion, therefore, that all the answers the Society have made to the claim of the plaintiff in this case fail, and that the decision of the learned Judge was correct.

BARTON J. I agree with the judgment which has been delivered with respect to the questions that arise on the pleadings, as far as they are questions of estoppel or waiver, and I do not propose on that point to make any lengthy remarks. I agree with His Honor the Chief Justice in attaching the greatest weight to the authority of the case of *Hughes* v. *The Metropolitan Railway Co.* (1). I am of opinion that if the documents in the present case did not show a completion of the contract, there was a pendency of negotiation amply within the decision in that case which would render it inequitable for the company to set up a lapse or forfeiture of the policy pending the negotiations. The facts of that case I do not propose to repeat, but I wish to refer to some of the remarks of Lord *Cairns* L.C. (2). The appellant had spoken of a letter which he had received, and the Lord Chancellor said:—"I read this as a definite intimation on the part of the respondents that they would not proceed to execute the repairs (although they stated their readiness to commence them forthwith), if they found that there was a probability of an arrangement to purchase being come to. The appellant, when he received that letter, might have said, I have no intention of becoming a purchaser; or he might have said, I may become a purchaser; but if a negotiation is to be commenced you must understand that it is to be without prejudice to my notice to repair; you must go on and make the repairs as if there was no

(1) 2 App. Cas., 439.

(2) 2 App. Cas., 439, at p. 445.

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negotiation; or he might have said simply, I will adopt what you propose, and enter upon a negotiation, saying nothing farther. That third course is the course which he took, and it is a course which, as it seems to me, when taken, carried with it the intimation that he was satisfied with the footing upon which the matter was put by the letter which he was answering. This is what his solicitors say in their letter of the 1st of December:—'If the company are the owners of' certain other houses, 'and are willing to sell them all' (that is all the houses), 'and give immediate possession, our client will, on learning the price, consider whether it is worth while to acquire the company's interest or not. In mentioning the price, please to give us particulars of the tenancies, and rents paid to the company.' Now, that being a letter which, as it appears to me, acceded to the suggestion that the repairs were to be deferred until it was ascertained whether an agreement could be made for the purchase, on the 4th December that letter of the 1st was replied to, and replied to in this way:—'We are in receipt of yours of the 1st inst. The particulars and terms asked for shall be sent in the course of a few days.' Again, on the 30th of December, the agents of the respondents wrote to the solicitors of the appellant—'We send you herewith a statement of the company's receipts and payments in respect of the houses in Euston Road as requested by you. The company will agree to surrender the whole of the leases in consideration of a payment of £3,000. We shall be glad to hear from you at your early convenience.' That is followed by the particulars of the Metropolitan Railway Company's interest in the houses in Euston Road, the property of Mr. Hughes," and so on. Now, I have read that passage in order to show the complete parallel in reason which exists between the negotiations that took place in that case, and the negotiations which have taken place between the deceased Bogie and the defendant Society; and for the same reasons that it was held inequitable that the appellant should there claim to insist upon his notice to repair within the specified time, I think it is quite clear in this case equity would not allow this Society to insist on the lapse or forfeiture of the policy. I attach, however, more importance to the other question, which is the one arising from the Statute—that is, the *Life Assurance*

Companies Act 1901 of Queensland. The 52nd section of that Act says: [His Honor here read sec. 52]. The 22nd section says: [His Honor here read sec. 22].

It is contended that in effect this Society gives no surrender value, and therefore it is exempt from the provisions of the section in respect of any agreement which it may make with any policy-holder. Now, there are some passages in the case before us very relevant to the correctness or otherwise of that contention. I find in the answer to interrogatory 26 this statement:—"In calculating the minimum value allowed for the surrender of policies for the whole term of life the guaranteed cash value is determined by a certain percentage of the cash reserve held by the defendant at the end of the third year of the existence of such policies." And the answer to Interrogatory 23, the question being what was the surrender value of the said policy on the 28th May 1904, was:—"The surrender value of the said policy, No. 1,019,296, on the 28th May 1904, was the sum set forth in the table on the third page of the said policy, as being the cash value at the end of the third year, which, to the best of my knowledge, information, and belief, is the sum of £14 10s." (that was afterwards corrected, and it was admitted that it should be the sum of £20.) The table set forth on the third page of the policy is "Table of Loans and of Surrender Values," containing calculations of cash value, which is the only value applicable to this case. We find on the same page:—"If the assured be living, and this policy is in force on the twenty-eighth day of November nineteen hundred and fifteen, the society will pay to the assured or assigns a cash bonus consisting in the policy's full share of surplus profits, as determined by the actuaries of the society, this policy may then be continued or surrendered by said assured or assigns under one of the following options," among which is—"Draw entire cash value (consisting of guaranteed cash value, as fixed in the above table, together with the bonus)." Now, the guaranteed cash value has already been identified in that table with the surrender value, and there is clear evidence of the intention of the Society, as between them and those who contracted with them, that there shall be a computation called surrender value, and that value is applicable within

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the terms of this section for the purposes of the section. In the same policy we find, a little above the signature of the officer of the Society, these words:—"The loans, surrender values, bonus guarantee options, privileges and conditions stated on the second and third pages hereof, form a part of this contract as fully as if recited at length over the signatures hereto affixed." So that the Society in this policy has contracted for such a surrender value as it describes, and if this surrender value is considered something different to the kind stipulated for by the Act, I find myself unable to apprehend the real difference. There being this surrender value, we find a statutory provision that "no policy issued by a Company shall lapse to the Company for non-payment of premiums so long as the premiums and interest in arrears are not in excess of the surrender value as calculated in accordance with the answer to the ninth question contained in the statement as prepared by the Company in the form of the eighth schedule to this Act." Now, it is important to remember that the Act of Parliament which we are considering is not a private Act; it is not an Act dealing with private relations. There might be some difference in the view one would take of it in the event of its having been a private Act incorporating this society in Queensland, but this Act is nothing of the sort. It is a public Act, regulating the entire relations between insurance companies and the public doing business with those companies, and in case of any doubt or ambiguity as to the construction of such an Act, regard must be had to its scope and purpose. The very provision in question is one of a series of enactments dealing with policies and protecting the relations of the public with any societies or companies which comply with the provisions of the Act, make their deposit, and are registered to do business. The conditions under which they are to do business are defined in the Act. Such an Act is *primâ facie* for the adjustment of public interests, and not for the accommodation of purely private rights. If that is the correct view, as from the scope and purpose I have not the least hesitation in saying that I take it to be, those who seek to show that the maxim *cuilibet licet renuntiare juri pro se introducto* is applicable here, must show that it is not only applicable to a Statute regulating private relations, but also to a Statute dealing

with public interests. *Maxwell's Interpretation of Statutes*, (4th ed.), p. 580, says :—" Another maxim which sanctions the non-observance of a statutory provision, is that *cuilibet licet renuntiare juri pro se introducto.* Every one has a right to waive, and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual, in his private capacity, and which may be dispensed with without infringing on any public right or public policy." The matter for present purposes is contained in the words *juri pro se introducto*, for, if the provision is solely for the regulation of a private right, then the person may take advantage of it, and not otherwise. At page 584, he says :—" But when public policy requires the observance of the provision, it cannot be waived by an individual. *Privatorum conventio juri publico non derogat.* Private compacts are not permitted either to render that sufficient, between themselves, which the law declares essentially insufficient; or to impair the integrity of a rule necessary for the common welfare; such, for instance, as the enactment which requires the attestation of wills." The right of persons to depart from a rule laid down by Statute, if it is purely in the regulation of private interests, and not if it is part of a public policy, has been illustrated in some American decisions, which seem to me to contain propositions of reason. One is the case of *Reilly* v. *Franklin Insurance Co. of St. Louis* (1), and in that it is stated :—" A Statute provided that where real property within the State, insured against fire, should be totally destroyed by fire without criminal fault of the assured, the amount of insurance written in the policy 'should be taken and deemed to be the true value of the property at the time of such loss, and the amount of the loss sustained,' and the measure of damages. In a policy issued after the Statute took effect, the parties stipulated that the damages should be established 'according to the true and actual cash marketable value' of the property when the loss happened. Held, that the amount written in the policy was conclusive as to the amount of damages, and on grounds of public policy could not be changed by such stipulation." Then the passage which was cited to us was referred to (pages 555 and

(1) 28 Amer. Rep., 552.

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556):—"But the Counsel further contends that, by reason of the stipulation in the policy, the Statute does not apply and cannot govern as to the extent of the defendant's liability. It is said the parties were abundantly able to contract for themselves; that they could restrict or change the rule provided by the Statute; and that the assured did expressly waive that rule, by agreeing that the loss should be established according to the true and actual cash marketable value of the property when destroyed. We have no doubt that the Statute applies to the policy; and so far as there is any conflict or inconsistency between it and the provisions of the policy, the Statute must control." A strictly analogous question was presented to the United States Circuit Court for the Western District of Missouri, in *White* v. *Conn. Mutual Life Insurance Co.* (1). In that case, it was held that an Act of the legislature of Missouri, in respect to policies of life insurance, extended to all policies delivered after the Act took effect; and that where the provisions of the Act were in conflict with the stipulations of the policy, the Act controlled. There is a further case cited, namely, *Griffith* v. *The New York Life Insurance Co.* (2). Although it is not authoritative, so far as this Court is concerned, it is competent, of course, for us to examine it, for the purpose of seeing whether it contains propositions to which our reason assents. In that it is stated:—"Where the object of a Statute is to promote great public interests, liberty, or morals, it cannot be defeated by a stipulation made by one of the class of persons entitled to its protection. If a Statute declares that no life insurance company shall have the power to declare forfeited or lapsed any policy by reason of non-payment of premiums, unless notice shall be given as in the Statute stated, any contract between the company and the assured stipulating for a forfeiture of the policy in the absence of such notice is *ultra vires* and void. The Statute indicates the legislative will, that, as a matter of public policy, life insurance corporations shall be deprived of the power to declare forfeited policies of insurance for the non-payment of premiums except in the prescribed mode, and a waiver on the

(1) 4 Dill, 177.
(2) 40 Amer. St. Rep., p. 96; 101 California, 627.

part of the assured cannot be considered to confer a power which the Statute has taken away." And then, on the question thus stated—"Did the non-payment of the second annual premium which fell due June 1, 1900 (but upon the payment of which a grace of one month was, by the terms of the policy, allowed), work a forfeiture of the policy?" the report proceeds (1):—"The law of the State of New York under which this policy is issued is set out in the twelfth finding of the Court, and need not be repeated. It is also found that the defendant did not give the notice, as required by said Statute.

"In avoidance of this Statute, and as a waiver of the notice there provided for, respondent relies upon the following clause in the policy:—'Notice that each and every payment of premiums is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any Statute is hereby expressly waived.'

"The policy also provided as follows:—'That if the premiums are not paid as hereinbefore provided, on or before the days when due, then this policy shall become void, and all payments previously made shall be forfeited to the Company.'

"Such provision as the law prescribes for the advantage or protection of individuals may, as a rule, be waived by them, where not inhibited by public policy.

"Where no principle of public policy is violated, parties are at liberty to forego the protection of the law: *Sedgwick on Statutory and Constitutional Law*, 109.

"Where, however, 'the object of a Statute is to promote great public interests, liberty or morals, it cannot be defeated by any private stipulation.'"

After referring to other cases, the Judge continues (2):—"The Statute in question is regarded as indicative of the legislative will that, as a matter of public policy, life insurance Companies should be deprived of the power to declare policies forfeited for non-payment of premiums, except in the prescribed mode, and that being deprived of the power so to do, a waiver on the part of the insured cannot be construed to confer such power in the face of the law which has taken it away. The reasons for such a policy

(1) 40 Amer. St. Rep., 96, at p. 102. (2) 40 Amer. St. Rep., 96, at p. 104.

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are so numerous and obvious, that it is not deemed necessary to occupy time and space in specifying them. The conclusion is reached that, as no notice was given by defendant, the policy was not forfeited by failure to pay the annual premium which fell due June 1, 1890." Now, there is a case in which a company of the same name as the defendant company was interested, and I believe it to be the same Society, viz., *Wall* v. *Equitable Life Assurance Society* (1). The Judge who delivered the judgment was *Brewer* J., Judge of the Supreme Court of the United States, but sitting on circuit in the Western District of Missouri. The averment of the defendants in the statement of the case (p. 274) was:—"That, in the application for insurance, the insured, in consideration of the agreements in the policy, thereby applied for, (being the agreement in said policy providing for paid-up insurance in the event of the surrender of the policy at certain periods and under certain conditions specified,) waived and relinquished all right or claim to any other surrender value than so provided, whether required by a Statute of any State or not"—words which have their echo in this policy. *Brewer* J. in giving judgment, said this:—"In respect to the second question, the following are the two sections of the Statute which are applicable:—Sec. 5983, 2 Rev., St.—'No policy of insurance on life hereafter issued by any life insurance company authorized to do business in this State, on and after the first day of August, A.D. 1879, shall, after payment upon it of two full annual premiums, be forfeited or become void, by reason of the non-payment of premium thereon, but it shall be subject to the following rules of commutation, to wit.' (Then follows a statement of the mode of computing the amount payable in such case). Sec. 5985—'If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in sec. 5983 and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the Company shall be bound to pay the amount of the policy, the same as if there had been no default in the payment of the premium, anything in the policy to the contrary notwithstanding.'

"Now, in the policy sued on there is a non-forfeiture clause, but

(1) 32 Fed. Rep., 273.

containing a different provision, and it is alleged that in the application the insured waived and relinquished all right or claim to any other surrender value than that provided in the policy, whether required by the Statute of the State or not. This is the doubtful question. It is strenuously insisted by the defendant that the Statute of Missouri neither forbids, nor declares null, nor makes anywise illegal, such a waiver as the one in question; that it merely gives a right or privilege to the insured which, like any other personal right or privilege, he may for sufficient consideration waive, and that such a waiver, not being forbidden by the Statute, is not contrary to public policy in any such sense as that the Courts should refuse to enforce it. Back of this argument and strongly supporting it is that liberty of contract which Courts are so strenuous to uphold. While I am constrained to hold adversely to the defendant, it is with grave doubts as to the correctness of my conclusion. In the first place, a technical argument can be made on the language of the Statute. It says the value of the policy *shall* be determined in a certain way, and then that, if the death of the insured occur during the term of temporary insurance covered by the value of the policy thus determined, the company *shall* be bound to pay the amount of the policy, 'anything in the policy to the contrary notwithstanding.' This language is broad enough to include a waiver, and may be construed as meaning that no stipulation, no waiver, no agreement for a different forfeiture,—in fact nothing that a party can put into a policy,—shall defeat the right to recover the full amount, if death occurs during this time of temporary insurance. Of course, this is a purely technical construction of the Statute, and I am disposed to rest my conclusion more upon the matter of public policy. And here the history of insurance must be taken into consideration. It is notorious that many insurance companies were rigorous in insisting upon forfeitures," (I think that possibly there is some parallel in the history here related and some happenings in these States of Australia), "sometimes under very inequitable circumstances, and there was no little public clamour by reason thereof. Such clamour prompted many legislatures to interfere, and to seek by legislation to protect what they supposed the rights of the insured.

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Such seems to have been the thought of the Missouri legislature, and it evidently intended by its legislation to provide a fixed and absolute rule applicable to all cases,—absolute and universal, because if it applied only in cases where the policies were silent, or if it could be waived or changed, a child can see that it would protect only so far as the insurance companies were willing. So, although no words of penalty are attached, no express denial of the right to waive, in fact no words of negation in any direction, yet it seems to me fair to say that the affirmative language of this Statute discloses a public policy which no Court ought to question or refuse to enforce: *Railway Co.* v. *Peavey* (1). The legislature has by this language declared a rule in respect to forfeitures in life insurance policies; it has thus established the policy which it believes should obtain in this State, and, though sitting on the Federal Bench, it is my duty to administer the laws of this State in the spirit in which they were enacted, and to uphold both their letter and their spirit. It is voluntary with any foreign insurance company whether it shall come into this State to transact business; coming in, it should be willing to comply with all the Statutes as to all business arising within this State, and no Court, least of all a Federal Court, should hasten to release it from this obligation. From these views and with this feeling, I am constrained, though with grave doubts, to sustain the motion to strike out." Well, the Supreme Court of the United States, to which the matter went on appeal, upheld the judgment of *Brewer* J., and apparently without sharing his doubts. I may as well refer to a few words from the judgment of *Gray* J. (2):—"By the Revised Statutes of Missouri of 1879, in force when this policy was made, it was enacted as follows." [Then follow the sections which I have read]. "The manifest object of this Statute, as of many Statutes regulating the form of policies of insurance on lives or against fires, is to prevent insurance Companies from inserting in their policies conditions of forfeiture or restriction, except so far as the Statute permits. The Statute is not directory only, or subject to be set aside by the Company with the consent of the assured; but it is mandatory, and controls the nature and terms of the contract into which the

(1) 29 Kan., 169.

(2) 40 U.S., 226, at p. 232.

Company may induce the assured to enter. This clearly appears from the unequivocal words of command and of prohibition above quoted . . ." The Judge winds up by saying:—" It follows that the insertion, in the policy of a provision for a different rule of commutation from that prescribed by the Statute, in case of default of payment of premium after three premiums have been paid; as well as the insertion, in the application, of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a Statute of any State or not;' is an ineffectual attempt to evade and nullify the clear words of the Statute." Although that decision does not bind us, it compels the assent of my reason. The matters determined are completely analogous—in fact, the reasoning is so clear that I cannot escape its conclusions in dealing with the present case, and here I am referring to the judgment of *Brewer* J., as well as to that from which I have just quoted. The case of *The Netherseal Colliery Co.* v. *Bourne* (1) was referred to. That was decided the year before the United States Court case which I have just read, but there is no similarity in the facts of the two cases. There is something similar in the principle involved. Persons were employed in a mine, under a contract that coals should be paid for at 1s. 6d. per ton, and heading slack at 7d. per ton, no other slack to be paid for; all other slack to be deducted from the different places in proportion to their loading, and a premium of 2d. a ton on the coal to be paid to all those places whose boxes of coal did not contain an average of more than 112lbs. of dust each week. The coal (including the slack gotten) was weighed close to the pit's mouth, and was then sorted and carried forty yards, and shot on a screen, more slack being caused by the operations; a note of the slack which passed through the screen was taken by a person employed only by the mine-owners, and the weight of the slack was deducted from the weight at the pit's mouth. The wages of the miners were paid according to the weight of the coal, after thus deducting the slack. An action was brought by the miners, to recover from their employers the difference between the wages so ascertained and the full wages if no such deduction had been made. It was held, affirming the

(1) 14 App. Cas., 228.

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decision of the Court of Appeal (1), that the miners were entitled to recover. By Lord *Halsbury* L.C. and Lords *Herschell* and *Macnaghten*: "Because, by the contract the amount of wages paid depended 'on the amount of mineral gotten' within the meaning of sec. 17 of the *Coal Mines Regulation Act* 1872 (35 & 36 Vict. 76), but the miners were not paid 'according to the weight of the mineral gotten' nor was 'such mineral truly weighed accordingly,' within the meaning of that section; for 'the mineral contracted to be gotten' was coal including slack, and slack was not 'material other than mineral contracted to be gotten' and was, therefore, not one of the deductions allowed by that section." The miners had made an agreement outside the terms of the Statute, but as they contested it afterwards, I presume that they found it not profitable to themselves. It was held that that agreement did not hold, because the miners were not entitled to contract themselves out of the terms of the Statute. Although there might have been a good deal of room for the argument that private relations only were concerned, it is clear that it was held that the Statute was a matter of public policy because it was for that reason that the miners could not contract themselves out of it. The decision given by the majority of the Judges in the House of Lords shows conclusively that they thought that this Statute created a statutory duty, which deprived the parties concerned of the right to contract themselves out of it. But it seems to me that the reasoning in the United States cases completely establishes the position of the plaintiff that this is a public Statute, dealing with public interests, and not merely a regulation of private rights. I have already expressed my opinion on that point, and the reasons for my opinion, and it follows that I am bound to hold that this Statute is not rendered inapplicable by the condition in the policy, and that the condition by which it is sought to take the matter out of the section and create a lapse, which then would be the position, is of no effect. I agree therefore that the appeal should be dismissed.

O'CONNOR J. I entirely concur in the conclusions of His

(1) 20 Q.B.D., 606.

Honour Mr. Justice *Power* on the facts decided by him, and I am of opinion that those conclusions must be supported, for the reasons given by my learned brother the Chief Justice. On that part of the case, I do not think it necessary to add another word, but the other ground, upon which His Honour Mr. Justice *Power* did not think it necessary to express an opinion, involves considerations of such importance, that I propose to add something to what has been already said by my learned brothers. In defending the action, the insurance company set up the fifth condition of the policy, which is in these words:—"This policy shall lapse and together with all premiums paid thereon shall forfeit to the society on the non-payment of any premium when due." They alleged that such being the terms of the contract, as a premium had not been paid, the policy lapsed. The plaintiff, on the other hand, relied on sec. 22 of the *Life Insurance Companies Act* 1901, which is in these words:—"No policy issued by a Company shall lapse to the Company for non-payment of premiums so long as the premiums and interest in arrears are not in excess of the surrender value as calculated in accordance with the answer to the ninth question contained in the statement as prepared by the Company in the form of the Eighth Schedule to this Act." The plaintiff alleged that the insurance company had in their hands surrender value to an amount sufficient to prevent the policy from lapsing within the meaning of that section, and therefore that they could not rely upon the fifth condition of the policy. The rule with regard to the interpretation of Acts of this kind may be very simply stated. Generally speaking, enactments of the legislature must be obeyed by all persons, and when the legislature enacts that a policy shall not lapse to the company under certain circumstances, that law must be obeyed, but there is an exception. Where the legislature has enacted something which only gives a right to an individual, and nothing more, that individual may waive that right. In order, however, to bring the case within that exception, it must be shown that the enactment of the legislature is one which deals only with an individual right. If it has behind it some object of public policy, indicated by the enactment itself, which makes it an enactment, not only for the benefit of one individual or one party to the contract, but

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for the benefit of the whole community, the ordinary rule will apply and the Statute must be obeyed. Now, it is on these principles that this Act must be construed. The beginning of this legislation in the State of Queensland is an Act called the *Life Assurance Act* 1879. Its title was an Act to encourage and protect life insurances and other like provident arrangements, and the preamble recites:—"Whereas it is expedient to encourage and protect life insurances and other like provident arrangements for the benefit of insured persons their wives and families." It extended protection to insurance moneys in the event of death, protection to insurance moneys from creditors, and during insolvency, and from executions. In 1901 the legislature went much further. They repealed the Act of 1879, and enacted the Statute which is now under our consideration. They seem in this Act to have taken up the position that the contract of life insurance was one of such immense importance to the whole community that it was expedient that the business of life insurance should be carried on and controlled by statutory provision; that it should be carried on only by companies which complied with certain statutory provisions; and that the policies should contain special provisions for the protection and advantage of policy holders. By the fifth section, every company which commences to carry on life assurance business in Queensland is obliged to make a deposit of £10,000, to be invested, and while the company is allowed to receive the interest which that money earns, the deposit is set apart as a security for the payment of the value of the policies of the policy-holders, and, on the winding-up of the company, the deposit must be applied to the payment of policies before any other debt can be paid. The legislature has insured the carrying out of these requirements by enacting, in sec. 50, that any failure to comply with the requirements of the Act is visited by a penalty of £50 a day, and in the case of companies registered under the Companies Acts, if the default continues for three months after notice of default given by the Treasurer, the company may be wound up on the application of a shareholder. The result of this legislative action is that the legislature of Queensland has really given a monopoly of the life insurance business in Queensland to those companies

which are willing to carry on their business in accordance with these provisions, and it practically prevents any other company carrying on business in competition with them. There, of course, is no obligation on any insurance company to carry on business in Queensland, but if it does so it will be under the protection, and must comply with the provisions, of the Act. I pass by some sections, which are not very material to the question under consideration, that is to say, such provisions as those relating to the filing of accounts and the making of statements, and I come at once to the sections which deal with the protection of policy-holders. The first of them is sec. 21, which provides :—" No policy shall be declared void by a Company by reason only of the person upon whose life the policy was effected having understated his age in his application for the policy, but the Company shall be entitled either to so reduce the amount payable under the policy that it shall bear the same proportion to the original amount of the policy as the annual premium payable thereunder bears to the annual premium which would have been payable if the true age had been stated according to the premium table of the Company in use at the date of the policy, or to accept payment from the assured of an amount equal to the difference between the annual premium paid by him and the annual premium which would have been payable as aforesaid if the true age had been stated, together with compound interest on such amount at the rate of five per centum, upon the assured undertaking to pay the proper annual premium in the future." That is directed at what is often merely a mistake on the part of the policy holder, which may often arise, without any fraud, but which we know, under the form of contract of a large number of companies, would absolutely vitiate the policy. Then we come to sec. 22, the section under consideration. Further on we find, under sec. 25, the forfeiture of what are called industrial policies, by reason of any default in payment of any contribution or premium, is prohibited until after certain notice, stating the amount of premium due, has been given to the policy-holder. Again, sec. 26 provides that, upon proof to a company that a person upon whose life a policy was effected has overstated his age in his application for the policy, the company shall at his option do one of two things, either increase the amount of

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the insurance money payable, so as to make it equal to what it would have been if the true age had been stated, or return to the assured in cash the amount of over-payment that he had made by reason of the over-statement of age. Now, these are the provisions in which the legislature steps in between the insured and the insurance companies. It says in effect to the company:—"The contract which you make in the business which you carry on here under the protection of the State must, whatever else it contains, include provisions giving these rights to your policy-holders, and we will not allow the forfeiture of those rights except on certain conditions." It does appear to me that, having regard to the purpose and object of life assurance, which is in fulfilment of the obligation to provide for those who are dependent upon him, which each individual owes to the community, when it is remembered that that kind of a contract is generally made subject to a large number of conditions which require very often skilled persons to understand, the legislature has thought fit to step in and say:—"We take charge of the business of the making of these contracts to such an extent as will insure financial stability in the insurance companies, and, in addition to that, we shall take care that the conditions on which you accept premiums are of such a nature as not to press unduly upon the persons who insure with you." Under these circumstances, it is clear that these provisions, instead of being merely intended for the benefit of the individuals who make the contracts, are, in pursuance of a general policy laid down in this Act, for aiding the individual in the discharge of a duty which is a duty to the State as well as to those depending upon him. These provisions, therefore, come under the general rule, they are legislative enactments which must be obeyed, like the provisions of any other Act of Parliament.

Now, coming to the section itself, the argument of Mr. Lilley turned principally upon the contention that sec. 22 contemplates the existence of a surrender value, and unless in cases where a surrender value within the meaning of the answer to the ninth question of schedule 8 exists, it is impossible to apply the section. He argues that a contract which provides that there shall be no surrender value is not a contract which is invalid in accordance with this law. The soundness of that argument depends altogether on what meaning you are to put on the words "sur-

render value." Mr. Lilley is quite right in stating that the original meaning of surrender value is a value which the company allows on the voluntary giving up of a subsisting policy, because the surrender of a policy, like the surrender of a lease or any other right, imports that there must be an existing right before it can be surrendered. There is no doubt that that was the original meaning of surrender value. There are a great many insurance companies that have provisions in their policies which enable the insured to voluntarily put an end, with the consent of the company, to the insurance, the company undertaking if he does so, to allow him a certain value for the premiums which he has already paid. But it is beyond all question that surrender value in the business of insurance companies has also another meaning, that is the present value of the premiums paid after deductions have been made in regard to investment, cost of insurance, and other matters of that kind, the deductions being made on actuarial principles to ascertain what is the fair proportion to return to the person whose money the insurance company has used for a certain number of years, but who on the other hand has had the benefit of insurance during the same period. It has therefore come about that the meaning of the words "surrender value" has long ago been extended beyond its old meaning, and has come to mean that amount which, on the termination of the policy, whether by lapse or by voluntary surrender, the insurance company is willing to pay over to the insured. It appears to me, therefore, that we have, in order to decide this question, to determine whether we ought to take the words "surrender value" in their original narrow meaning, or whether we should take them in the larger and more popular sense to which I have alluded. The principle in the construction of Statutes applicable to questions of this kind is this—where a technical word or word of legal meaning is used in a Statute, *primâ facie*, it must be given its legal meaning. Therefore, *primâ facie*, the meaning of "surrender" is voluntary surrender. Then, the next rule of interpretation becomes applicable, that is, that, if such a construction would render the provision of the Act to a large extent futile, then, if there is another meaning—it may be the popular meaning—which if given to the words will make the Statute

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effective, it will be taken that the legislature has used the words as having that popular meaning. If "surrender value" means the value which the company allow on the voluntary surrender of the policy, it would be in the power of a company to escape the provisions of this Act by providing that there should be no surrender value except in cases where the policy was subsisting, and the company chose to allow it to be surrendered. An interpretation of that kind would render the prohibition against the lapse of a policy in sec. 22 nugatory, and, therefore, we must look to the other interpretation. The other interpretation, giving the more extended meaning which I have referred to, is an interpretation which will enable the provisions of sec. 22 to be carried out in every case where the insurance company have in their hands a sum of money representing the amount of the premiums received which, after the proper deductions, leaves a sum exceeding the amount of the premium due. I think there can be no doubt, if the object of the legislature is to be considered, that it was to secure that benefit to the policy-holder when those circumstances existed, and also to secure that, so long as an insurance company hold such moneys in their hands, the policy shall not lapse.

The next question is, was there a surrender value in the sense in which I have used the expression, and in the way provided for in the table of this company? It is quite clear that there was. I do not think one need go beyond the policy itself, because in that there is the plainest possible statement that there is a surrender value. In the heading of the conditions, it is stated that "the loans, surrender values, bonus guarantee options, privileges, and conditions, stated on the second and third pages hereof, form a part of this contract as fully as if recited at length over the signatures hereto affixed." We find in condition V. that what is spoken of there as "surrender value" is not a surrender value in the old sense, but a surrender value in the popular sense to which I have alluded, because it is there provided that the "policy shall lapse and together with all premiums paid thereon shall forfeit to the Society on the non-payment of any premium when due; excepting that upon due surrender of this policy within six months after said lapse, providing premiums have been duly paid for at least three full years of assurance." In that event it is provided

that the insured shall be entitled to certain privileges, according to "the following table of surrender values." That is not a surrender in the old sense of the word, but a surrender within six months after lapse. I need not go through those provisions of the policy, which have been already referred to by my learned brothers. It is almost impossible to look at any portion of this policy which deals with the matter under consideration without finding that the insurance company has provided a surrender value which fulfils all the conditions of a surrender value such as I have indicated, and which, although often described as a "cash value," is just as often described as "surrender value." Such being the provisions of the policy, I have no doubt that it was a surrender value upon which a computation may be made under sec. 22, and that, therefore, the section in this respect applies.

The only remaining question is whether the plaintiff has contracted himself out of that section. I have already dealt with the impossibility of the plaintiff legally contracting out of the section, because both the insured and the insurance company are bound to obey the law; but, in addition to that, I think it is plain, on the ordinary interpretation of language, that the insured has not contracted himself out of the rights which are given to him by sec. 22. The contract was made before the Act was passed. It was made on the form of contract which we understand is used in America. The words "gives up all right or claim to temporary assurance," is a phrase used in the American Acts, in respect of which this clause of the contract was intended to operate. It would certainly require very much stronger words than are used here to indicate an intention to give up, not only all rights already given by Statutes in existence at the date of the policy, but rights that may be hereafter given by other Statutes. On that ground also, I agree that there has been no contract made to give up the rights which sec. 22 has conferred on the assured under this *Life Insurance Companies Act.* As to the second ground, therefore, which was not decided by Mr. Justice *Power*, I agree that the defence cannot be sustained, and the plaintiff must succeed.

Appeal dismissed, with costs.

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Solicitor, for appellants, *J. C. Tyler*, by his agents, *Flower & Start.*

Solicitors, for respondent, *Fitzgerald & Walsh.*

H. E. M.

Appl *Hardie Rubber Co Pty Ltd v General Tire & Rubber Co* (1973) 129 CLR 521

[HIGH COURT OF AUSTRALIA.]

WILLIS AND ANOTHER . . . . . APPELLANTS;
DEFENDANTS,

AND

TREQUAIR . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 17, 18, 21, 24.

Griffith C.J., Barton and O'Connor JJ.

Evidence—Commission to examine defendant abroad—Application by co-defendants—Witnesses Examination Act (*N.S.W.*), (*No.* 34 *of* 1900), *secs.* 4, 5.

Practice—Appeal from Supreme Court—Interlocutory Judgment—Judiciary Act 1903 (No. 6 of 1903), *sec.* 35.

On an application by a party for a commission to examine a witness out of the jurisdiction, under sec. 4 of the *Witnesses Examination Act* 1900, if it is shown to the satisfaction of the Court that the witness is out of the jurisdiction, that his evidence is material, that the Court has no power to enforce his attendance, and that the party applying cannot procure it, the Court is bound in the exercise of its discretion to order the commission to issue, unless the other party can satisfy the Court that the witness can and will attend.

This principle applied to the case of an application by two of three co-defendants to have the evidence of the third defendant taken on commission in South Africa.