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any one of those funds or branches, the class must be closed as to that fund or branch, but it would be stretching the artificial rule to an unwarranted extent to close altogether the class in his favour though he had no present right to payment of another fund or branch of the fund.

Appeal dismissed. Costs of all parties as between solicitor and client to be paid out of the estate.

Solicitors, for the appellants, *Simmons, Crisp & Simmons*; *Roberts & Allport.*

Solicitors, for the respondents, *Dobson, Mitchell & Allport*; *Simmons, Crisp & Simmons.*

B. L.

Foll *Dallhold Investments (in liq) v Gold Resources Aust Ltd* (1991) 31 FCR 587

[HIGH COURT OF AUSTRALIA.]

YOUNG AND OTHERS . . . . . APPELLANTS; DEFENDANTS,

AND

TIBBITS AND OTHERS . . . . . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 17, 18, 19; *May* 16.

Griffith C.J., Barton and Isaacs JJ.

Principal and agent—Employment of agent—Claim for commission—Evidence—Effect of silence.

In an action by the plaintiffs claiming commission on a sale of the defendants' property effected by the plaintiffs and in respect of which sale they alleged they had been employed as agents by the defendants,

Held, by *Griffith* C.J. and *Barton* J. (*Isaacs* J. dissenting) that there was no evidence fit to be submitted to a jury of such employment, the evidence

showing only the employment of the plaintiffs by another agent of the defendants on the terms that the plaintiffs were to receive from that other agent one-half the commission which he received from the defendants.

Silence is not evidence of an admission that a statement of fact is true unless there are circumstances which render it more reasonably probable that the person whom it affects would deny its truth than that he would be silent.

Decision of the Supreme Court of New South Wales reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales by Walter Charles Tibbits, James Wilfred Tibbits and Edgar Cockburn Tibbits against Robert John Young, Walter James Young and Stephen Stephen Ralli, claiming commission upon the sale for £33,000 of Yarrandale Estate by the plaintiffs for the defendants, at their request. The action was tried before *Pring* J. and a jury, who found a verdict for the plaintiffs for £465. A motion to the Full Court by the defendants to set aside the verdict and to enter a nonsuit, or a verdict for the defendants, or to grant a new trial, was dismissed with costs.

From that decision the defendants now appealed to the High Court.

The facts are fully set out in the judgments hereunder.

Knox K.C. (with him *Brissenden*), for the appellants. When W. C. Tibbits showed the telegram of 28th May 1910 to Gillespie's representative as his firm's authority to sell, he fixed the rights between the appellants and Broughton & Co., who then became entitled to commission on any sale made through the respondents, and liable to pay the respondents as sub-agents half that commission. Having acted on that telegram the respondents are estopped from afterwards saying that they were employed by the appellants as their agents. Nothing that happened afterwards affected that position.

Thomson (with him *Mitchell*), for the respondents. There was evidence fit to go to the jury that the respondents were employed by the appellants as their agents. The evidence of what happened after 28th May 1910 is such that the jury might properly

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find that there was privity of contract between the appellants and the respondents. Under the circumstances the jury might, from the omission of the appellants to reply to the respondent's letter of 30th May, draw the inference that the appellants acquiesced in the position then asserted by the respondents: *City Bank of Sydney* v. *McLaughlin* (1); *Lucy* v. *Mouflet* (2); *Sutton & Co.* v. *Ciceri & Co.* (3); *Wiedemann* v. *Walpole* (4); *Pickard* v. *Sears* (5).

Knox K.C., in reply.

Cur. adv. vult.

May 19.

The following judgments were read:—

GRIFFITH C.J. In this action the plaintiffs, who are commission agents, sued for commission claimed to have been earned by them as agents employed by the defendants to effect a sale of property called Yarrandale. The action is founded upon contract. The defendants deny that they ever entered into any contractual relations with the plaintiffs. The question for determination is whether there was any evidence of a contract fit to be left to a jury.

In the year 1909 the plaintiffs had asked the defendants to put the property in their hands for sale, which they had refused to do. On 4th October 1909 the defendants again wrote to them as follows:—

"Dear Sirs,

"As advised you more than once Yarrandale is not for sale. At the same time we will be prepared to consider an offer of not less than 50s. per acre as it stands.

"When you think you have a buyer up to that value we may then be prepared to give you the offer."

In April 1910 the defendants, who live near the town of Young in New South Wales, placed the property in the hands of a firm of commission agents, named J. Broughton & Co., of that town, for sale. The plaintiffs carry on their business at a town called Gilgandra, distant nearly 200 miles from Young as the

(1) 9 C.L.R., 615.
(2) 5 H. & N., 229.
(3) 15 App. Cas., 144.
(4) (1891) 2 Q.B., 534.
(5) 6 A. & E., 469.

crow flies, and with which the railway communication is circuitous. The defendants and Broughton & Co. were in telephonic communication with each other.

It is common ground that when a firm of commission agents employed to find a purchaser for a property effect the sale through another firm of commission agents the commission earned is received by the first-mentioned firm and divided between themselves and the other firm.

On 28th May 1910 the plaintiffs telegraphed to the defendants as follows:—

"Kindly grant us 14 days' offer Yarrandale 50s. Have genuine buyer. Please reply prompt."

It appeared that the telegram was sent at the instance of a Mr. Gillespie, who ultimately became the buyer, and who had asked the plaintiffs if they could get the offer of Yarrandale, and requested them to secure fourteen days' offer and to get particulars of the property.

At this stage the plaintiffs were agents for Gillespie to get an offer. They were certainly not agents for the defendants.

The defendants, having already placed the property in Broughton & Co.'s hands for sale, requested them to reply to plaintiffs' telegram, which they did by telegraph on the same day as follows:—

"Tibbits—Gilgandra.

"You hold fortnight's offer Yarrandale 50s. per your wire Mr. Young. Name buyer when inspect. Broughton."

It is common ground that the expression, "you hold fortnight's offer" was intended, and was understood by plaintiffs to mean "We give you a firm offer for a fortnight."

The senior member of the plaintiffs' firm said in his evidence that he did not then know who the firm of Broughton were, but inferred that they were agents when he received their telegram of 28th May. He added "If we accepted the offer from Broughton we should have been bound to share commission. That is the custom amongst agents."

The position at this time was that Broughton & Co., as agents for the defendants, had made a communication to the plaintiffs, the effect of which was to authorize them to put Yarrandale

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under offer to their undisclosed principals for a fortnight at 50s. an acre. In so doing they would, as between the defendants and Gillespie, be acting on behalf of the defendants, but it is not suggested that any privity of contract was at that stage created between them and the defendants. But, if they accepted Broughton & Co.'s mandate, they would become Broughton & Co.'s agents, and a contract of agency would be established between Broughton & Co. and them under which they would be entitled, if the transaction resulted in a purchase, to receive half commission from Broughton & Co., to whom the defendants would be liable to pay the whole.

So far there is no controversy, and so the Supreme Court thought. The learned Chief Justice described the conclusion as obvious.

On the same 28th May (a Saturday) the plaintiffs, having received Broughton's telegram, saw Gillespie's representative at Gilgandra, and showed it to him. They also gave him some particulars of the property, with which the plaintiffs were acquainted, having acted on the occasion of the purchase of it by the defendants. The ultimate result of this introduction of the defendants and Gillespie to one another was the sale in respect of which commission is claimed.

I pause again for a moment to state the position of the parties at this time. The plaintiffs had accepted and acted upon Broughton & Co.'s mandate, and had by so doing agreed to act as their sub-agents, according to a course of dealing by which, if the sale came off, Broughton & Co. would have earned the full commission, of which they would be entitled to claim half.

I proceed to state the facts on which the plaintiffs rely as establishing a direct contract between themselves and the defendants to the effect that, if the sale came off, they should be entitled to the whole of the commission, and to receive it from the defendants, and not from Broughton & Co. Such a contract, if made, would, of course, leave the defendants still liable to Broughton & Co. also for the full amount of commission.

On 30th May the plaintiffs wrote to the defendants as follows:—

"Dear Sir,

"We wired you on Saturday last, 28th ultimo, for 14 days' offer of your Yarrandale property at £2 10s. per acre and received a reply signed 'Broughton' stating we had 14 days' offer from date. Our man is very genuine and will inspect before the offer expires and without divulging his name we herewith refer you to Messrs. McLeod & Co., Millers, Wellington and Gilgandra.

"Having the property direct from yourself we cannot recognize Mr. Broughton or any other agent in the sale if it comes off."

On 28th May Broughton & Co. had written to the plaintiffs a letter confirming their telegram of that date. The letter is as follows:—

"Yarrandale,

"Dear Sirs,

"Mr. Young informed us to-day that he had a wire from your good selves for offer of this property, and, as it is solely in our hands for sale, we wired you as follows:—'You hold fortnight's offer Yarrandale 50s. per your wire Mr. Young. Name buyer when inspect,' which we now beg to confirm.

"We feel sure this property is really good buying at this price and hope we may effect sale in conjunction.

"Kindly let us have name of buyer and arrangements as to inspection, when we will wire Mr. Godtschalk, the Manager, and so arrange that you shall be afforded a good inspection.

"We will also do our very best at this end to aid you in every way in regard to negotiations, and will, if necessary, run out.

"Awaiting your kind commands under this head,

"Yours faithfully,

"J. Broughton & Co.

"P.S.—Of course this price is present title."

With this letter were included full particulars of the property, bearing date 21st April and signed "J. Broughton & Co. (Sole Agents), Young, N.S.W."

It appears from the internal evidence supplied by the plaintiffs' letter of 30th May, which is confirmed by evidence as to the course of post, that they had not received Broughton & Co.'s letter of the 28th when they wrote their letter of the 30th to the

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defendants. They probably received it on the 30th shortly after posting their own letter.

No answer was sent to either letter.

On 2nd June Broughton & Co. sent a telegram to the plaintiffs as follows:—

"Wire name buyer when inspect Yarrandale. Strongly recommend prompt action.

Broughton."

to which no reply was sent by the plaintiffs.

On 11th June the plaintiffs telegraphed to the defendants as follows:—"Buyer delayed Melbourne. Will you extend offer Yarrandale six days. Genuine. Reply." This communication was of an ambiguous nature. It might be regarded either as a request made on behalf of Gillespie for a concession, or as a request for authority to grant him a concession. It is also ambiguous in another sense. In its terms it might be either a communication sent by the plaintiffs in the capacity in which they had acted on the 28th, *i.e.*, as sub-agents of Broughton & Co., or a direct communication from agents to their principals. The defendants granted the concession asked, and further correspondence followed between the plaintiffs and the defendants, all of which was equally ambiguous in its aspect, and which ended in a concluded contract.

On 15th August the plaintiffs sent to the defendants an account for £595 for commission, of which the defendants took no notice.

On 9th September Broughton & Co. sent to the plaintiffs a cheque for £230 describing it as their moiety of the commission which they (Broughton & Co.) had received from the defendants. The defendants did not acknowledge the receipt, but paid the cheque into their banking account, where it still remains. They, however, offered at the trial to give the defendants the benefit of it. On 12th September they wrote to the defendants saying that they could not accept Broughton's cheque in settlement and did not recognize Broughton & Co. in the matter at all. On 19th September they again wrote in reply to a letter from the defendants saying *inter alia*, "We base our claims on your letter to us 4.10.09 also our letter to you 30.5.10."

The defendants replied on 21st September as follows:—

"We have your letter of 19th instant, with enclosures, but fail to see any connection between our letter of 4th October, 1909, and the question in dispute, as you will observe that we simply said that we might be prepared to give you the offer if you advised us of a likely buyer at 50s., while you will quite admit that up to the time we had placed the property solely in the hands of Messrs. Broughton & Co. we had no such appeal from you, but after you learnt of Messrs. Broughton & Co.'s sole agency you then applied asking for the offer at 50s., whereupon we consulted our sole agents, who at that time happened to have no buyer in view, so consequently they sent you particulars, which particulars, and authority to sell, are the only ones you have received in the matter.

"Your letter of 30th May acknowledging receipt of the offer of Yarrandale from Messrs. Broughton & Co., and implying that you had placed same before a buyer, we note, ends with a paragraph in which you say you cannot recognize Mr. Broughton in the matter. This we would read to be the ordinary form of bluff adopted by a great many agents to secure the full commission at the expense of the agent who, up till then, had been doing the whole work in connection with the sale, but as such methods do not coincide with our ideas of doing business we cannot now allow it to interfere with the position."

In a reply sent on 27th September, the plaintiffs say: "We never knew or heard of Messrs. Broughton being your agents until we received their wire," *i.e.*, the telegram of 28th May.

Upon these facts the plaintiffs contend that the jury were at liberty to infer that a contract was made between the plaintiffs and the defendants after 30th May, by which the latter agreed to employ the former as their agents to carry on the negotiations already begun by them in another capacity and to pay them full commission for doing so, remaining also liable to Broughton & Co. for the full commission.

Of course no such agreement was actually made, but it is said that the jury might infer as against the defendants that they assented by silence to the assertion made in the plaintiffs' letter of 30th May.

There are, no doubt, many occasions when silence gives assent,

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but there is some limitation. I respectfully adopt the words of *Bowen* L.J. in *Wiedemann* v. *Walpole* (1):—"The limitation is, I think, this: Silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not. That appears to me good sense, and it is in substance the principle laid down by *Willes* J., in *Richards* v. *Gellatly* (2). He says:—'It seems to have been at one time thought that a duty was cast upon the recipient of a letter to answer it, and that his omission to do so amounted to evidence of an admission of the truth of the statements contained in it. But that notion has been long since exploded, and the absurdity of acting upon it demonstrated. It may be otherwise where the relation between the parties is such that a reply might be properly expected.' In this case I think it would be unreasonable and insensible to suppose that the defendant was called upon to answer the statements contained in the plaintiff's letter to him, upon the alternative that they must be taken to be true if he did not deny them." The learned Lord Justice then referred to a case in which the Court of Appeal held that having regard to the circumstances under which a statement was made the fact that the defendant did not deny it was evidence of an admission that it was correct.

Regard must, therefore, be had to all the circumstances of the case. The assertion said to have been admitted by silence in this case is "Having the property direct from yourself." This statement was false to the knowledge of the plaintiffs, and they had already with knowledge of the truth accepted and acted on the authority given them by Broughton & Co. Moreover, if any possible doubt could have been in their minds, it was removed on the same day on receipt of Broughton & Co.'s letter of the 28th, and the defendants must have known that they had received it on the 30th. Now, although, where the existence of a fact is doubtful, silence in face of an assertion of its existence may be evidence as an admission of the truth of the assertion, I do not know of any case in which that doctrine has been applied where the fact is not doubtful and the assertion is known by both

(1) (1891) 2 Q.B., 534, at p. 539. (2) L.R. 7 C.P., 127, at p. 131.

parties to be untrue. In such a case the only recourse open to the party asserting the falsehood is to the doctrine of estoppel, which the plaintiffs in this case would invoke in vain. So far from being placed in any worse position by pretending to believe in the truth of what they knew to be untrue they only went on to perform a duty which they had already undertaken.

Under these circumstances the defendants' omission to answer the plaintiffs' letter affords, in my opinion, no evidence of an admission of the fact of a direct employment of the plaintiffs by them. The additional statement that the plaintiffs will claim full commission adds nothing to their case.

It is to be regretted that the defendants did not at once correct the plaintiffs' error, if it can be so regarded. But I think that they were excusable in regarding the letter as being what they described it in theirs of 21st September. This letter, therefore, and the omission to answer it afford no evidence of the existence of a contract then existing between them and the plaintiffs.

On the other hand, I am unable to reconcile with any notions of fair dealing the plaintiffs' silence with regard to Broughton & Co.'s letter of the 28th. When they received it they were fully aware of the actual circumstances on which they knew that Broughton & Co. and defendants were relying. If that letter added nothing to their previous knowledge the letter of 30th May was impudently untrue. If it added anything, they were called upon in common honesty to qualify their letter just previously written, and on which the ink was scarcely dry.

The plaintiffs' case must, therefore, be put on another ground if they are to succeed. Their contention must be that their letter of 30th May was a request to the defendants to employ them, that is, in law, a proposal to the defendants to enter into a contract with them, and that this proposal was accepted.

The first question that arises on this contention is whether the letter is open to such a construction. If it is, the proposal was, in effect, that the defendants should discharge Broughton & Co., and employ the plaintiffs, who had already acted as agents for Broughton & Co. in the matter, in their place, retaining, however, their liability to Broughton & Co. for damages for breach of contract. A proposal made by a sub-agent to the principal to

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treat his own immediate principal in such a manner behind his back (for the plaintiffs did not communicate with Broughton & Co.), is, I hope, unusual. I doubt whether the plaintiffs' letter of 30th May is capable of such a construction. To make a statement which is untrue to the knowledge of both parties is, to say the least, an uncommon way of making a proposal. But, assuming the letter to be capable of being so read, it is, at best, ambiguous. If such a proposal had been made in plain language, there is little, if any, doubt that the business would have been at once taken out of plaintiffs' hands, as they must have known.

Now, although a letter expressed in ambiguous language may sometimes be construed as against the writer in the sense in which the recipient understood it and acted upon it, the doctrine does not apply in favour of the writer unless it is shown affirmatively that the recipient understood the letter in the sense alleged: *Falck* v. *Williams* (1).

I have already said that all that followed is equally consistent with the plaintiffs being either direct agents of the defendants or sub-agents of Broughton & Co.

The plaintiffs, however, rely in particular on a statement made by one of the defendants to them after the transaction was concluded, to this effect, "You've made a good sale, Tibbits, and you will hear from me later." This is, to my mind, equally ambiguous, and equally consistent with plaintiffs having acted as agents for the defendants, or as sub-agents for Broughton & Co. I take it to mean simply "I will put some business in your way."

The burden of proof is on the plaintiffs, and, if the evidence is equally consistent with the existence or non-existence of the agreement alleged, a jury cannot, any more than in an action for negligence, supply the defect by conjecture.

It seems to be sometimes forgotten that in the case of an agreement which is alleged to be proved by a course of action it is necessary, as much as in the case of any other agreement, to show a consensus of both parties, and that it is not enough to show that one party thought he had made an agreement, if it is clear that the other party had not in fact assented to any such terms as alleged, unless his conduct has been such as to create an

(1) (1900) A.C., 176.

estoppel. It is preposterous to suppose that the defendants intended to agree to pay the plaintiffs full commission while still remaining liable to Broughton & Co. for the same amount. The plaintiffs knew this as well as the defendants did. The best that can be made of the plaintiffs' case on this point is that there never was any *consensus ad idem*, and in that view their case fails.

Attempts by commission agents to force themselves upon owners of property, and to establish a contract which the owners never intended to make are not unknown in the history of litigation. An attempt not only to force themselves upon the owner, but to force out other agents from whom they have already accepted a mandate is, I hope, less frequent.

The plaintiffs' position is, in effect, that the defendants said to them "We have discharged Broughton, remaining of course liable to pay him his commission, and from henceforth we employ you as our agents." Such a story is, on its face, highly improbable. It is sufficient to say that I cannot find any evidence fit to go to a jury in support of it.

I much regret that we have not had the advantage of a statement of the reasons which led the learned Judges in the Supreme Court to arrive at a different conclusion.

In my opinion the appeal should be allowed.

BARTON J. The evidence is almost entirely documentary. The real question is whether the plaintiffs, now respondents, have established a case justifying a jury in finding as a fact that they were direct agents for the defendants, who, on the other hand, contended that the plaintiffs were no more than sub-agents employed by Broughton & Co. to help them in effecting a sale. The letters and telegrams that passed between the parties during 1908 do not affect that question. On 29th September 1909 the plaintiffs wrote from Gilgandra to the defendant, R. J. Young, at Young, "You might let us know per return of mail if you will sell Yarrandale again." (The defendants had been the purchasers of it in 1906 at 29s. an acre, the plaintiffs then acting as the vendor's agents) . . . "If you could give us an idea of your figure we could wire you if we wanted the offer." To this the

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defendants replied on 4th October 1909, "As advised you more than once, Yarrandale is not for sale. At the same time we will be prepared to consider an offer of not less than 50s. per acre as it stands. When you think you have a buyer up to that value we may then be prepared to give you the offer." Clearly the defendants did not then place the property in the plaintiffs' hands for sale. Nothing further was done between the parties until the 28th May 1910—nearly eight months later. On that day the plaintiffs telegraphed to the defendants "Kindly grant us 14 days offer Yarrandale 50s. Have genuine buyer. Please reply prompt." Now in the previous March the defendants had placed the property in the hands of Messrs. Broughton & Co., a firm of stock and station agents at Young. On receiving the plaintiffs' telegram just quoted, the defendant, R. J. Young, spoke to Broughton & Co. on the telephone, told them of the plaintiffs' telegram, and asked them whether they had any other application. On receiving a reply in the negative, Young says "I gave them permission to grant the offer to plaintiffs for a fortnight at £2 : 10 : 0." Broughton & Co. immediately acted on this permission by sending the plaintiffs the following telegram, which they received on the same date: "You hold fortnight's offer Yarrandale 50s. per your wire Mr. Young. Name buyer, when inspect." At this point it may be observed that it would scarcely be sensible to suppose that Young by his telephone message discharged Broughton & Co. and instructed them to appoint the plaintiffs in their place, or that Broughton & Co. by their message were carrying out such an instruction, and giving themselves "the happy dispatch" from their agency. Yet that is in effect contended. If the contention is wrong, there was only a sub-agency. A joint but direct agency is not contended for, the reason being, of course, that the plaintiffs received half commission from Broughton & Co. and kept it. Let us see how the defendants themselves understood and treated it.

The two plaintiffs give varying accounts of the way in which they understood this telegram. The junior partner, Mr. Wilfred Tibbits, says that on the 28th May, after receiving the telegram, he saw Mr. Kemp Bruce, the manager for Mr. Gillespie, who ultimately became the purchaser, and showed Mr. Bruce the telegram.

He says "I had not any idea that Broughton & Co. were agents. When I received the wire I thought Broughton was a manager." Mr. Walter Tibbits, the senior partner, says, however, "I did not know who the firm of Broughton was. I inferred they were agents when I received their wire of 28th May." He also said "If we accepted the offer from Broughton we should have been bound to share commission. That is the custom among agents."

But it is common ground that the plaintiffs, who had no direct authority from the defendants, acted after the receipt of the telegram as if they had authority from some one to negotiate a sale.

On the 28th May Mr. Wilfred Tibbits had had a conversation at Gilgandra with Mr. Gillespie. That gentleman had instructed Tibbits to secure a 14 days' offer, and let Mr. Kemp Bruce know the result, as he, Gillespie, was leaving for Dubbo. Accordingly the telegram from the plaintiffs to the defendants, asking for such an offer, was sent, and after Gillespie's departure Broughton & Co.'s telegram was received. Tibbits showed this to Bruce, and handed him particulars of Yarrandale, which his firm had received from Dalgety & Co. Ltd. some three years before on behalf of a prior vendor. It contained merely a slight alteration, for Mr. Tibbits inserted the words and figures "present title, £2 : 10 : 0 as it stands."

The situation was this. The plaintiffs having asked the defendants for an offer of the property at 50s. an acre for a fortnight, received no reply from them, but received this telegram from their sole agents. If the plaintiffs did not regard Broughton & Co. as the defendants' agents, they could only look upon them as mere intermeddlers. If that were correct, the plaintiffs acted without any authority at all. But the last thing the plaintiffs desire is to be placed in that position. Therefore we must take it that the plaintiffs regarded Broughton & Co. as having, with the defendant's authority, either appointed them agents to the defendants or sub-agents to Broughton & Co. But it would have been utterly absurd to place such a construction on Broughton & Co.'s telegram—which was obviously an answer to their own telegram to the defendants—as to conclude that Broughton & Co. were actually handing over their own agency to the plaintiffs. Commission agents do not act in that way. Hence only one

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rational conclusion remained, and it was not open to the jury to draw an irrational one. It is that Broughton & Co. were with the defendants' consent appointing the plaintiffs sub-agents or assistants to themselves in the disposal of the property. The plaintiffs, by showing Broughton & Co.'s telegram to Bruce, evidently as the reply to their own telegram to the defendants, and by at once going on with the endeavour to sell the property to Bruce's principal, treated Broughton & Co.'s telegram as their authority. It is clear that Broughton & Co. were not divesting themselves of their own position as agents, and, therefore, clear that they were employing the plaintiffs as their sub-agents. Then the latter wrote the defendant Young on the 30th. They say, and it is accepted, that they wrote before receiving Broughton & Co.'s letter of the 28th to which I will refer in a moment. After referring to their own telegram of the 28th, and to that from Broughton & Co. they add: "Having the property direct from yourself we cannot recognize Mr. Broughton or any other agent in the sale if it comes off." They describe the Broughton telegram as a "reply" to their own, and they show that they knew Broughton to be an agent by the phrase "Mr. Broughton or any other agent." And there is no fact in the case which could justify the assertion that they had the property direct from the defendants. It was an untruth, so manifest to the defendants that they could not be looked on as admitting it, if they treated it with silent contempt. Is it "the ordinary practice of mankind" (to use the phrase of Lord *Esher* M.R. in *Wiedemann* v. *Walpole* (1), to answer a groundless assertion of that kind? Are there "circumstances which render it more reasonably probable that a man would answer" such an assertion—as *Bowen* L.J. put it in the same case (2)? That learned Lord Justice quoted from the judgment of *Willes* J. in *Richards* v. *Gellatly* (3), his statement that the notion had been long exploded that the omission by the recipient of a letter to answer it amounted to evidence of an admission of the truth of the statements contained in it, though *Willes* J. thought that "it may be otherwise where the relation between the parties is such that a reply might be

(1) (1891) 2 Q.B., 534, at p. 538. (2) (1891) 2 Q.B., 534, at p. 539.
(3) L.R. 7 C.P., 127, at p. 131.

properly expected." I see nothing in the relation between the parties at the time of this letter which made a reply to a statement, untrue past all controversy, a thing to be reasonably expected. An admission inferred from silence is an admission that the statement not repudiated is true. But the statement here in question is false to demonstration even upon the evidence of the plaintiffs themselves. How then could the silence of the defendants make it true for any purpose of this case? There could not be an estoppel to bind the defendants, because it is impossible to say that their silence caused any prejudicial alteration in the position of the plaintiffs. They simply continued their endeavours to effect the sale to Gillespie, having already by their conduct accepted the position assigned them by Broughton & Co.

But on 30th May—after having sent the defendants the letter of the 28th—the plaintiffs received Broughton & Co.'s letter of the 28th. In this, after stating that Mr. Young had informed them that he had received their telegram asking for "an offer" and that the writers had, as the property was solely in their hands for sale, sent their telegram of the same date, which they quoted, they said "We . . . hope we may effect sale in conjunction . . . We will . . . do our very best at this end to aid you in every way in regard to negotiations, and will, if necessary, run out." Thus the plaintiffs knew as a fact on the 30th what Mr. Walter Tibbits inferred on the 28th, that Broughton & Co. were agents for the sale of Yarrandale. If they did not know on the 28th that that firm were sole agents, they received plain intimation of it on the 30th; and they also knew that the sole agents desired to effect a sale in conjunction with them. They had no reason whatever to doubt any of Broughton & Co.'s statements, which are now verified by the evidence of Mr. Young. Here is a very different position from that which the defendants occupied on the receipt of the plaintiffs' claim that they had the property direct from the defendants. In the one instance the important statement required no disproof, and in the other it was true. A reply to the former assertion could not reasonably be expected. But it was only reasonable to expect that a statement of the cardinal fact affecting themselves, which

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called for disproof, should have elicited a reply from the plaintiffs. Yet they remained silent, and I think no other construction can be placed on such a silence but that the cardinal fact was admitted. Notwithstanding, therefore, that they had asserted a direct agency, the writings and their own conduct show that the plaintiffs had received and acted upon an appointment as sub-agents to Broughton & Co., and it does not prejudice the position of the defendants that this sub-agency was created with their knowledge and approval. As to the rest of the evidence, the plaintiffs contend that the subsequent communications either explained the previous ones as meaning a direct agency, or altered the relations of the plaintiffs with the defendants so as to constitute such direct agency. I do not agree with either of these contentions. The plaintiffs having been appointed by Broughton & Co. their sub-agents with the knowledge and approval of the defendants, and there being no pretence, that if Broughton & Co. were not displaced on 28th May, such a displacement had since occurred, the mere fact that the defendants afterwards, and at times when circuity would have imperilled the negotiations, allowed the plaintiffs to hold direct communication with them, and, at the plaintiffs' desire, answered their telegrams and letters direct instead of insisting on their passing through Broughton & Co., is not in my judgment any evidence of a direct agency. It does not point to such a conclusion either by explaining or by altering the effect of the previous communications and dealings. There was no break in the plaintiffs' negotiations with Gillespie. They were dealing with the same "genuine buyer" who was the subject of their telegram of 28th May which resulted in their becoming Broughton & Co.'s sub-agents. These negotiations, although protracted, were all the one transaction in view of which the sub-agency had been constituted. Nor can any ponderable argument for the plaintiffs be founded on the use in the telegrams of the word "offer." That term had previously been applied by all parties to the inception and continuance of the original employment of the plaintiffs, and its unaltered use certainly cannot be adduced as evidence of an altered relationship.

I am of opinion, therefore, that originally the plaintiffs were not employed by the defendants, but became the sub-agents of

Broughton & Co., and as such were paid by them half of the commission, which they have banked and have never disgorged; and further that the plaintiffs continued in their sub-agency up to the conclusion of the sale, and, therefore, have no claim against the defendants.

I do come to this conclusion not merely upon the weight of evidence. The evidence is in my opinion all one way save so far as the case for the plaintiffs is in opposition to the documents and to clear inference from their own conduct. Where it is in such opposition I do not think a conclusion in their favour is such as could have been arrived at with any show of reason. I am of opinion therefore that the verdict for the plaintiffs should have been set aside and that the appeal must be allowed.

ISAACS J. The respondents' claim is for commission for selling the appellants' station Yarrandale. It is not disputed that the respondents actually sold the station, with the full knowledge and assent of the appellants and in the very presence of one of them, nor that the appellants have taken full advantage of the sale, and received the purchase money. They say, however,—and this is their only defence—that they never in any way contracted with the respondents in relation to the matter. They suggest that the respondents were the sub-agents of a firm called Broughton & Co., whom the respondents never saw, and to whom they never addressed any communication direct or indirect, but with whom it is nevertheless maintained they were contractually bound as their only principals.

A considerable body of evidence, oral and written, was presented at the trial, consisting of interviews between respondents and appellants, letters, telegrams, and business transactions from which the jury drew the conclusion that the respondents had accepted the services of the appellants as their agents. No one representing Broughton & Co.—the alleged principals—was called. Four learned Judges of the Supreme Court of New South Wales have thought there was sufficient evidence for the jury to arrive at that conclusion. *Cullen* C.J., for the whole Full Court, said it was impossible to say there was no evidence upon which the jury could so find, or that the Judge would have

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been justified in directing a verdict for defendants. My learned brethren, however, think otherwise. I regret not to be in accordance with that opinion, as I consider the view taken by the Supreme Court was fully supported by the facts and circumstances brought out at the trial.

It is necessary for me to state the grounds upon which I form my opinion. I am of course compelled to remember, as said by Lord *Hatherley* in *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (1), speaking of a jury trial, that it is not "the office of the Judge to weigh or balance conflicting evidence, however strongly the evidence on one side may, in his judgment, preponderate."

It would be a usurpation of the function of the jury, the constitutional tribunal in this case, to find the facts, it would be in fact a breach of the law which divides their duties from the duty of the Court, and enables the parties to be governed by the opinions of business men, were I to attempt to ascertain whether or not the parties had arrived at an agreement by conduct.

My province is strictly confined to ascertaining whether upon the evidence the jury, as men of the world, could reasonably draw the inference that the appellants had assented to the respondents acting as their agents, and not as the sub-agents of Broughton & Co. It is a well established principle of law formulated by *Blackburn* J. in *Smith* v. *Hughes* (2) that "if, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

It comes to this, then, is there evidence sufficient to warrant the jury in thinking the appellants assented to the respondents acting after 28th May 1910 in direct privity with them, or led them so to believe ?

Now although the Court must decide such a question for itself in every case, because of its general duty to see that verdicts are not rendered without any evidence to support them, yet there

(1) 3 App. Cas., 1155, at p. 1171. (2) L.R. 6 Q.B., 597, at p. 607.

are well-defined principles to guide it in this regard. It was settled by *Willes* J. in *Cooper* v. *Slade* (1), and there supported by authorities, that "in civil cases the preponderance of probability may constitute sufficient ground for a verdict"; and again, quoting from *Newis* v. *Lark* (2), he said (3):—"If the matter is doubtful, they may found their verdict upon that which appears the most probable."

Upon the undisputed facts of this case, it seems to me the jury, with the common knowledge they possess of the ordinary conduct of their fellows and how reasonable men in the respective positions of the parties would conduct themselves and understand each other's words and behaviour in relation to the business in hand, were at liberty to say the greater probability is that the appellants assented to the respondents' terms. So strong is the case that, had they found the other way, it would have been a serious question in my mind whether that finding could stand. But, at the least, the facts leave no doubt in my mind they are sufficient to support the verdict.

Tibbits & Co. are stock and station agents at Gilgandra. In July 1908 (a misprint in the case puts it as 1906) they met Young and ultimately sold to the appellants the station Yarrandale. Two or three months afterwards the elder Tibbits met Young and Ralli at Gilgandra and asked if they would sell it again. Young said yes, if he got a fair price. That started the matter—a direct communication. Shortly afterwards came respondents' telegram 19th October 1908; appellants telegraphed a reply on the same date; one suggesting a price, the other expressing a willingness to consider it, but stating "property is not in the market." That last statement coupled with the rest might naturally lead respondents to suppose the property would not be placed in anyone else's hands. Respondents' letter of 20th October and the reply of the 22nd resulted in an intimation of willingness to consider an offer direct through respondents, but not to give an offer.

So the matter rested till September 1909, when respondents again wrote asking if Yarrandale were for sale, and for a figure.

(1) 6 H.L.C., 746, at p. 772. (2) Plowd , 412.
(3) 6 H.L.C., 746, at p. 773.

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The appellants replied by letter 4th October 1909 that Yarrandale was not for sale, but they were prepared to consider an offer of not less than 50s. an acre. They added "When you think you have a buyer up to that value we may then be prepared to give you an offer." No withdrawal or qualification of that letter was ever made.

On May 28th 1910 the younger Tibbits, clearly having that letter in mind, told Gillespie that they had among other properties for sale this station—Yarrandale. He described its advantages. All this was in pursuance of the direct relations between the parties. Gillespie was so favorably impressed that he asked for a 14 days offer to be secured, requested particulars and a plan and asked price. Tibbits said 50s. Gillespie said "let Bruce" who was his manager "know the result of application for offer."

Tibbits at once wired to Young direct for 14 days offer at 50s. saying "genuine buyer."

The answer came the same day: "You hold fortnight's offer Yarrandale 50s. per your wire Mr. Young, name buyer when inspect. Broughton."

Now this communication must have been very puzzling. There had been no mention of any other agent, the station was "not for sale," up to then all communications had been direct, the request was direct, and this was an affirmative reply. But it was signed "Broughton."

It appears there was a firm of auctioneers, living at the town of Young, a short distance from the appellant Young, and on the same telephone exchange. The respondents did not know the firm, did not know they were agents, had had no correspondence with them. As a fact the only member of the firm, even as far as the appellant Young is aware, is a person named Tuson. The receipt of the telegram signed "Broughton" of course conveyed the idea that "Broughton," whoever he might be, was in some way acting as agent for Young, but how precisely did not appear. In view of the previous communications between them, Tibbits took Young's authority, however conveyed, and showed it to Bruce, as previously arranged with Gillespie. This did not so far legally bind Young, and as far as it morally bound him, did not affect Young's relations with Tibbits. There is no word of "sole"

agency, or even of principal agency. A man may have several agents, and one agent may well be the hand to employ another. But, as Tibbits the elder says: "If we accepted the offer from Broughton we should have been bound to share commission That is the custom among agents." That means, that though Tibbits would still have been Young's agent, he would, if he had accepted Young's offer through Broughton, have had a side relation with Broughton which, as between them, would, by the custom of agents, have meant that Tibbits would have had to share with Broughton his (Tibbits's) commission when received from Young. But he did not believe, and there was no statement compelling him to believe, that Broughton, whoever that person might be, was Young's "sole" agent, and that his (Tibbits's) position was a mere sub-agency. Consequently, even if there had been no other difficulty in the way, Young could not in my opinion successfully contend that Tibbits was bound by the sender's intention, or even by the ultimate construction which the Court put on it. So much is a matter of clear law, and was so held by the Privy Council in *Falck* v. *Williams* (1). The head-note sufficiently states the principle in these terms:— "Where parties have corresponded by means of a telegraphic code, it is for the plaintiff, in an action for breach of contract, to show that the proposal made by him and accepted by the defendant is so clear and unambiguous that the defendant cannot be heard to say that he misunderstood it. It is not a matter for the Court to construe." Now, therefore, whoever relied on this ambiguous telegram would run the risk of its ambiguity.

I agree with the Supreme Court that up to this point there was no contract between the parties, or between any parties, for Tibbits never had any intention of agreeing with any but Young. Now the main argument for the appellants was rested upon the fact that Tibbits the younger showed Bruce the telegram his firm had received from Broughton. It was put that the use so made of it was an acceptance of Broughton's offer to employ Tibbits's firm as sub-agents, and excluded Tibbits from making any claim of direct agency for Young. I must confess my inability to follow that argument. What I have already said is one answer to it.

(1) (1900) A.C., 176.

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But it is open to more answers than one. If Tibbits had never done anything further in connection with the sale, and had rested his claim upon the meritorious effect of his efforts up to that date, it would have been a question whether he had not taken his chance of Broughton's authorization to convey Young's offer with all its consequences. But that is not the case. Even assuming Tibbits acted riskily in showing Bruce the telegram, he was not bound to go a step further. He had entered into no binding agreement to pursue the matter, or to say another word or write another line, or take another journey in connection with the property. And so, giving the fullest possible force to the use of the Broughton telegram, it still remains an authority—direct or indirect from Young—which cannot affect the subsequent dealings or negotiations. Then Tibbits makes the position for the future clear beyond possibility of doubt by his letter of the same date. He says in it that he had wired Young, and received a telegram signed Broughton, mentions that the proposed buyer is genuine, and adds "Having the property direct from yourself we cannot recognize Mr. Broughton or any other agent in the sale if it comes off." The statement that he had the property direct is quite consistent with all that happened. He had asked Young direct, and got an answer in reply to that request and therefore presumably by the personal authority of Young, which happened to be true. That letter is as distinct an intimation to Young as can well be imagined, that at all events all future efforts to sell the property must be on the basis stated, and the parties being already in a business relation, I take it the principle of the cases cited in *International Paper Co.* v. *Spicer* (1) to which I may add *Roberts* v. *Hayward* (2) applies, and Young cannot take refuge in silence. He might have replied refusing the further services of Tibbits on the terms required. In such a case silence may be considered by the appropriate tribunal as equivalent to assent. If Young had replied to the letter of 28th May in the affirmative of course no question could arise. And his conduct may be taken by the jury as equivalent. That was a question for them. Obviously *Falck* v. *Williams* (3) cannot govern the

(1) 4 C.L.R., 739, at p. 760. (2) 3 C. & P., 432.
(3) (1900) A C., 176.

position at this point because, not only is the letter not ambiguous, but the contract relied on is not either a telegraphic or written communication, and that alone, but is formed partly by writing, partly by words and partly by conduct, all of which is, on long established principles, a matter for the jury as upon an oral contract. *Moore* v. *Garwood* (1) states the law in very distinct terms. *Patteson* J. for the whole Court said:—"We then come to the main point in the case,—whether it was a question of law for the Judge,—whether he ought to have taken upon himself to say what the contract was; or, on the other hand, whether that was a question for the jury. Now there was a good deal of evidence, independent of these letters and of other documents. There was the conduct of the parties, which was relied upon, and which appeared from the statements of the witnesses in the progress of the trial."

The important statement in the letter of 28th May is not the statement of directness, but that they would look to Young as their direct employer. That was plain enough, and if the respondents were ever so wrong in their reason for insisting on it, they did insist on it, and the question for the jury was whether Young ultimately yielded to it. After the despatch of that letter, however, Broughton's letter of the same day arrives. It states (1) that the property is solely in their hands for sale, that is up to that time; (2) that they hope for a sale in conjunction; (3) they are willing to aid Tibbits in regard to negotiations, that is Tibbits's negotiations; and (4) they are awaiting what they call their kind commands. There is a good deal of ambiguity about this letter as to whether a sub-agency or a co-ordinate and conjunctive agency is intended. The enclosure shows how the term "sole agency" comes. It appears from that, that, as far back as 21st April 1910, they so described themselves at foot. But it is headed "For strictly private sale," and the respondents knew nothing of it. They might very well ignore Broughton & Co., especially as their real reply was already sent to Young; they might refuse as they already had said to recognize them, and continue to deal direct with Young and him alone, or not at all, and, if with him, then upon such terms as were expressly or

(1) 4 Ex., 681, at p. 689.

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impliedly agreed to. Broughton & Co. received no answer whatever from the respondents, but we must assume Young honest, and if so he in all probability communicated Tibbits's letter to Broughton & Co. when received. If so Broughton & Co. knew Tibbits's attitude — but if not, it is immaterial to Tibbits. Broughton & Co. telegraphed again on 2nd June to Tibbits. Importance is attached to that telegram by the appellants. It is important for a reason I shall presently mention and which might well commend itself to a jury. It says "Wire name buyer when inspect Yarrandale. Strongly recommend prompt action."

Tibbits consistently enough ignored this communication, and Broughton & Co. as business men must have understood that persistent want of recognition especially when coupled with Tibbits's letter of 28th May.

But why did Broughton & Co. send that telegram at all, and why did they strongly recommend "prompt action"? They were—it might well be thought by a jury—forcing themselves into a probable sale which Tibbits's firm had brought into a promising condition without the least assistance from them, and upon the strength of prior promises from Young. No reason is suggested by Broughton & Co. why they became so urgent. But there is evidence from which a jury could fairly conclude Broughton & Co. were anxious for a reason then undisclosed to get recognized without delay, and why Young was silent up to June 11th or 12th, and why immediately that period expired he had no hesitation in dealing direct with Tibbits just as he had done down to the previous October.

Young stated in evidence that on 10th March that he put Yarrandale in Broughton & Co.'s hands for sale, and that they were to have the sole agency for three months. For two months and a half they had been utterly unsuccessful, and their period of agency was nearly up. When Young got Tibbits's telegram on 28th May, the term of sole agency had only 13 days to run, and only 14 days' offer was asked for and given. Young may have felt bound at that time to communicate with Tibbits not personally but through Broughton & Co. This may have been taken by the jury to account for his silence and inaction in respect of the letter of 28th May. But as soon as the three months were

up, that is, by 11th June, Young was free from any engagement of sole agency, and so far as the evidence appears, of any agency, and was at liberty to communicate directly and he did so henceforth. Whatever his reason, however, the effect as regards the respondents would be the same. On 11th June, Tibbits telegraphed to Young for an extension. Broughton & Co. henceforth disappeared from the scene entirely for some three months, that is, until after the whole transaction was completed, and a month after payment was demanded. Tibbits had yet to induce Gillespie to buy, and on 22nd June Young personally extended the offer for a little while, and on 27th June extended it to 2nd July. The respondents do not rest on mere silence, as in *Wiedemann* v. *Walpole* (1). It seems to me impossible to treat these personal communications by Young as if he were the mere representative of Broughton & Co.—as the agent of his supposed agents. I say "supposed," because Broughton & Co.'s agency for all that appears never was renewed and so the extensions by Young cannot be assumed to be extensions of Broughton & Co.'s supposed authority. In view of Tibbits's letter of 28th May, Young's affirmative action in extending the offer without a word of caution is a doubly strong circumstance against him, and the principle of *Smith* v. *Hughes* (2) applies. On 30th June, Young directly instructed Tibbits to address him at Sydney where he was going. This was done on 1st July. Next day there met at Yarrandale Young, the vendor, Gillespie, the purchaser, and Tibbits, the agent, besides the manager and others. Broughton & Co. were conspicuous by their absence, which is wholly unexplained. Tibbits effected the sale and Young went away saying "You've made a good sale Tibbits and you will hear from me later." This observation becomes memorable.

The contract was completed, and the respondents on 15th August sent in their account to Young. No complaint, no denial of agency, reached them from the appellants until the letter of 14th September, a month after receipt of the account. In the meantime Young had apparently been in communication with Broughton & Co. The respondents' claim was £595. Broughton & Co. were apparently willing at that time to do it

(1) (1891) 2 Q.B., 534. (2) L.R. 6 Q.B., 597.

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for £460, which was £5 less than the jury awarded. Seeing that they had done nothing, it is not surprising they fixed the lower amount or sent a cheque to the respondents for half. The retention of the cheque has been observed upon. But it is quite understandable. In the covering letter from Broughton & Co. they informed Tibbits that it was a moiety of what Young & Ralli had sent. So that it really represented the appellants' money, and the respondents might well think themselves justified, and the jury were at liberty to think them justified, in retaining it as a payment of the appellants' liability *pro tanto*. They so informed Young most distinctly on 12th September. This evoked a response on the 14th which from its tone the jury might easily believe to have emanated from Broughton & Co., though signed by appellants. It reads much more as a justification for Broughton & Co. than for Young & Ralli. So also as to the letter of the 21st, which contains the astonishing statement that the appellants were asking a particularly high payment for a very little work. The writer must have been ignorant of Mr. Young's admission on 2nd July as to the respondent's good work, and must have ignored the fact that Broughton & Co. were asking hundreds of pounds for no work at all. But in any case anything said or written after 2nd July could not affect the rights of the respondents which were then fixed. As evidence of prior attitude they are relevant, but in that aspect they might fairly be considered by the jury to tell heavily against the appellants. In the face of this formidable body of testimony, given in presence of the jury who had the opportunity and the duty of judging of the veracity and honesty of the persons who came before them, as well as of the significance of Tuson's absence, my mind is utterly unable to accept the contention that there is no evidence to support the verdict.

In my opinion the appeal should be dismissed with costs.

Appeal allowed. Order appealed from discharged. Judgment for the defendants with costs. Respondents to pay the costs of the appeal.

Solicitors, for the appellants, *Cape, Kent & Gaden*, for *Gordon & Garling*, Young.

Solicitors, for the respondents, *Beveridge & Burfitt*, for *Beveridge & Burfitt*, Gilgandra.

B. L.

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Rev Aust Windows Fund v National Mutual Life Assoc (1914) 17 CLR 657

[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN WIDOWS' FUND LIFE ASSURANCE SOCIETY LIMITED DEFENDANTS, APPELLANTS;

AND

THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LIMITED PLAINTIFFS. RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 14, 15, 18, 27, 28, 29; *May* 27.

Griffith C.J., Barton and Isaacs JJ.

Insurance—Life assurance—Policy of re-insurance—Indemnity—Insurable interest—Untrue statements made by original insured—Rights and liabilities as between insurer and re-insurer.

A contract made by an insurer by way of re-insurance may or may not be a contract of indemnity. Whether it is or is not is to be determined from all the terms of the contract.

Where by a policy of life assurance the truth of certain statements made by the assured is expressly warranted, and those statements are afterwards proved to be false, the policy is only void in the sense that it does not create an enforceable agreement, but the insurer has on the execution of the policy an insurable interest.

A., a life assurance company, issued a policy of assurance for a certain sum with bonuses thereon on the life of M., by which it was provided that the policy should be void if (*inter alia*) any document upon the faith of which the