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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[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

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policy was granted should contain any untrue statement. One of those documents was a personal statement by M. On the same day that this policy was executed A. made a "proposal for re-insurance" to B., another life assurance company, for the same sum, but without bonuses, in respect of the life of M. The proposal contained a statement that "For all particulars in regard to health, habits, age, and other information relative to the life above described, reference is made to" a number of documents, including the personal statement of M. above referred to, "and it is understood that in accepting the risk under this re-assurance" B. "does so on the same terms and conditions as those on which" A. has "granted a policy, and by whom, in the event of claim, the settlement will be made." B. accepted the proposal and issued to A. a policy which recited (*inter alia*) that "the statements contained in, and in fact appearing upon" certain documents, including the proposal by B. and the personal statement of M. above referred to, "are the basis of this contract, and are to be deemed part hereof and to be incorporated herewith." The policy then witnessed "that in the event of the death of" M. "while the premiums as aforesaid are duly paid" B. "will pay to" A. the sum assured "within one calendar month after such evidence as the Board of Directors may consider necessary to establish the age, identity, and death of" M. "has been supplied to" B., subject to a proviso that the amount payable by B. should not exceed that paid by A. under the original policy. M. having died a claim was made; and, investigation having failed to disclose evidence upon which in A.'s judgment a successful defence could be founded, A. paid to his representative the whole amount payable under the original policy, and then brought an action against B. to recover the amount assured by B. The jury having found that some of the statements made by M. in his personal statement were untrue, but that A. in becoming satisfied of the validity of the claim of M.'s representative and in paying the same acted reasonably and in good faith,

Held, by *Griffith* C.J. and *Barton* J. (*Isaacs* J. dissenting) that the truth of the statements made by M. was not warranted by A. but only the fact that those statements had been made by M., that B. was bound by A.'s settlement of the claim, and that A. was entitled to recover the sum insured by B.'s policy.

Decision of the Supreme Court of Victoria: *National Mutual Life Association of Australasia Ltd.* v. *Australian Widows' Fund Life Assurance Society Ltd.*, (1911) V.L.R., 466; 33 A.L.T., 93, affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court of Victoria by the National Mutual Life Association of Australasia Ltd. against the Australian Widows' Fund Life Assurance Society Ltd. to recover £5,000 alleged to be due and owing to the plaintiffs under a policy issued by the defendants by way of re-insurance upon

the life of one Patrick Moran. The action was tried before *Madden* C.J. and a jury, who answered certain questions put to them by him and upon those answers he ordered judgment to be entered for the defendants with costs.

From this judgment the plaintiffs appealed to the Full Court by whom the appeal was allowed and judgment was ordered to be entered for the plaintiffs with costs; *National Mutual Life Association of Australasia Ltd.* v. *Australian Widows' Fund Life Assurance Society Ltd.* (1).

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

The material facts are fully stated in the judgments hereunder.

Mitchell K.C., *McArthur* and *Starke*, for the appellants. Apart from any special provision a contract of re-insurance is a separate contract altogether from the original contract of insurance and the re-insurer may against the insurer rely on any defences that the insurer could rely on against the original insured: *Universal Marine Insurance Co.* v. *Miller* (2); *National Marine Insurance Co. of Australasia* v. *Halfey* (3); *Chippendale* v. *Holt* (4); *China Traders Insurance Co. Ltd.* v. *Royal Exchange Assurance Corporation* (5); *Arnould on Marine Insurance*, 8th ed., p. 422; *May on Insurance*, 4th ed., vol. I., p. 148.

[ISAACS J. referred to *Allemannia Fire Insurance Co.* v. *Firemen's Insurance Co.* (6).]

That being so the respondents must find something in the policy or proposal inconsistent with that general rule. A re-insurance contract is not a contract of indemnity: *Nelson* v. *Empress Assurance Corporation Ltd.* (7); *Joel* v. *Law Union and Crown Insurance Co.* (8). The provision in the policy of re-insurance that "the statements contained in, and in fact appearing upon the proposal and declaration, together with those contained in and in fact appearing upon the copies of personal statements . . . . are the basis of this contract," is a warranty of the truth of the statements in the personal statements, and not

(1) (1911) V.L.R., 466; 33 A.L.T., 93.
(2) 3 W.W. & aB. (L.), 139.
(3) 5 V.L.R. (L.), 226.
(4) 65 L.J.Q.B., 104.
(5) (1898) 2 Q.B., 187.
(6) 209 U.S., 326.
(7) (1905) 2 K.B., 281.
(8) (1908) 2 K.B., 863, at p. 873.

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merely of the fact that those statements were made, and the truth of them is a condition precedent to liability under the contract: *Thomson* v. *Weems* (1); *Macdonald* v. *Law Union Insurance Co.* (2); *Ellinger & Co.* v. *Mutual Life Insurance Co. of New York* (3); *Barnard* v. *Faber* (4); *Wheelton* v. *Hardisty* (5); *Anderson* v. *Fitzgerald* (6). The words " on the same terms and conditions as those on which the " respondents " have granted a policy," at the end of the proposal, bring into the contract between the appellants and the respondents the conditions of the original policy. The words " by whom, in the event of claim, the settlement will be made," are not sufficient to override the other provisions of the contract. They are only in effect a statement that the respondents remained the principals under the original policy.

They are not apt words either by themselves or in conjunction with any other words in the contract to make the respondents the judge as to whether the conditions of the original policy had been performed.

[GRIFFITH C.J. referred to *Western Assurance Co. of Toronto* v. *Poole* (7).

ISAACS J. referred to *Anderson* v. *Thornton* (8).]

The words were inserted either to enable the respondents to have the honor of paying the representatives of Moran or to avoid the liability which, under American decisions, the re-insurer is under to the original insured: *Barnes* v. *Hekla Fire Insurance Co.* (9).

[ISAACS J. referred to *De Hahn* v. *Hartley* (10); *Jeffries* v. *Life Assurance Co.* (11).]

[Counsel also referred to *Marten* v. *Steamship Owners' Underwriters Association* (12); *Hambrough* v. *Mutual Life Insurance Co. of New York* (13).]

Irvine K.C. and *Davis*, for the respondents. The truth of the personal statements made by Moran was not made the basis of

(1) 9 App. Cas., 671, at p. 683.
(2) L.R. 9 Q.B., 328.
(3) (1905) 1 Q.B., 31, at p. 35.
(4) (1893) 1 Q.B., 340.
(5) 8 El. & Bl., 232.
(6) 4 H.L.C., 484, at p. 503.
(7) (1903) 1 K.B., 376.
(8) 8 Ex., 425, at p. 428.
(9) 45 Amer. St. R., 438.
(10) 1 T.R., 343, at p. 345.
(11) 22 Wall., 47, at p. 53.
(12) 7 Com. Cas., 195; 71 L.J.Q.B., 718.
(13) 72 L.T., 140.

the contract between the appellants and the respondents but merely the truth of the fact that those statements were made. Even if the truth of those statements was made the basis of the contract the parties agreed that the question whether those statements were true or not should be determined by the respondents. Such an agreement is not inconsistent with the truth of the facts being the basis of the contract, their truth being also the basis of the contract between the respondents and Moran, as to which the respondents were to determine. In a contract of re-insurance the re-insured *primâ facie* warrants his own statements. Where a contract of re-insurance incorporates terms which are inconsistent with the nature of re-insurance, the Court will reject them: *Home Insurance Co. of New York* v. *Victoria-Montreal Fire Insurance Co.* (1). The covenant by the appellants is to pay on proof of age, identity and death, and all other matters are left to the determination of the respondents. The "settlement" which by the proposal was to be made by the respondents means the determination as to whether the respondents should pay Moran's representatives. A contract of re-insurance is a contract of indemnity: *In re Athenæum Life Assurance Society* (2); *Porter's Law of Insurance,* 3rd ed.. p. 282. There is no magic in the words "shall be the basis of the contract," and in each contract it has to be determined whether the matters which are said to be the basis of the contract are conditions precedent: *Wheelton* v. *Hardisty* (3). It was not intended that the truth of Moran's statements should be a condition precedent to there being any contract at all: *Thomson* v. *Weems* (4).

[ISAACS J. referred to *Foster* v. *Mentor Life Assurance Co.* (5); *Dalby* v. *India and London Life Assurance Co.* (6).]

Whether this contract is a contract of indemnity or not, it is a contract to pay as much as, and no more than, the respondents might be legally compellable to pay and had paid under its policy with Moran.

Mitchell K.C., in reply.

(1) (1907) A.C., 59.
(2) Johns., 633.
(3) 8 El. & Bl., 232, at p. 296.
(4) 9 App. Cas., 671, at p. 683.
(5) 3 El. & Bl., 48.
(6) 15 C.B., 365.

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[The following authorities also were referred to:—*Consolidated Real Estate and Fire Insurance Co.* v. *Cashow* (1); *Bank of South Australia* v. *Williams* (2); *Pattle* v. *Hornibrook* (3); *New York State Marine Insurance Co.* v. *Protection Insurance Co.* (4); *New York Bowery Fire Insurance Co.* v. *New York Fire Insurance Co. of the City* (5); *Arnould on Marine Insurance*, 7th ed., p. 455; *Smith's Leading Cases*, 11th ed., vol. II., p. 294.]

Cur. adv. vult.

The following judgments were read:—

GRIFFITH C.J. The question for determination in this case depends upon the construction of a policy of life assurance upon the life of one Patrick Moran, issued by the appellant company, the defendants, in favour of the respondent company, the plaintiffs, and described in the plaintiffs' proposal as a re-assurance. Some confusion has, I fear, been caused by a discussion of the nature of contracts of re-insurance in the abstract, and in particular of the question whether such a contract is a contract of indemnity. The general definition of re-insurance is that it is a contract by which an original insurer throws upon another the risk for which he has made himself responsible, and for which he still continues to be responsible. There is the high authority of *Page-Wood* V.-C., for saying that a contract of re-insurance of a risk upon life is a contract of indemnity: *In re Athenæum Life Assurance Society* (6). But it does not follow that every contract of insurance made by an original insurer with another insurer for his own protection is a re-insurance in the sense I have stated. Such a contract may, as between the parties, be an original insurance. This is well illustrated by the case of *Dalby* v. *India and London Life Assurance Co.* (7). In that case the Anchor Life Assurance Co., for whom the plaintiff sued, had insured the life of the Duke of Cambridge for £3,000 in four separate policies, but, desiring to limit their risk on one life to £2,000, they, in the words of *Parke* B., who delivered the judg-

(1) 41 Maryland, 59.
(2) 19 V.L.R., 514; 15 A.L.T., 106.
(3) (1897) 1 Ch., 25.
(4) 1 Story Dec., 458, at p. 460.
(5) 17 Wend., 359.
(6) Johns., 633.
(7) 15 C.B., 365; 24 L.J.C.P., 2.

ment of the Exchequer Chamber (1), "effected a policy with the defendants for £1,000, by way of counter-insurance." The policy was in the usual form. It did not refer to the existing policies, and was not in any ordinary sense of the term a re-insurance. The only question raised and decided was whether the Anchor Co. had an insurable interest in the Duke's life. In the course of his judgment *Parke* B., said (2):—"The contract commonly called life assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, —the amount of the annuity being calculated, in the first instance, according to the probable duration of the life: and, when once fixed, it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bonuses have been given by prosperous offices) the same, on the other. This species of insurance in no way resembles a contract of indemnity. Policies of assurance against fire and against marine risks, are both properly contracts of indemnity,—the insurer engaging to make good, within certain limited amounts, the losses sustained by the assured in their buildings, ships and effects."

That very learned Judge was not dealing with a contract of re-insurance, in which the re-insurer adopts and makes himself liable for the identical risk of the re-insured, but with the ordinary contract of life assurance. The case is therefore only useful as showing that a contract which an insurer makes by way of counter-insurance is not necessarily a contract of indemnity. Whether it is or not must depend upon the terms of the contract itself, by which, and not by any descriptive label that may be affixed to it, the rights of the parties must be determined. I proceed, therefore, to consider the contract now before us.

Before December 1907 the plaintiff company had assured the life of Patrick Moran for £5,000. On 4th December he made a proposal to them for a further assurance of £5,000. The proposal contained certain statements as to his age and other matters, and referred to a personal statement to be made to a medical referee of the Association, and concluded with the following declaration:—

(1) 15 C.B., 365, at p. 386. (2) 15 C.B., 365, at p. 387.

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"I hereby declare that the above statements are true, and that the basis of the contract for the proposed Assurance shall be this Proposal and Declaration together with the said Personal Statement. I hereby agree to be bound by the Articles of Association."

Moran made, in fact, two personal statements to two medical officers, Drs. Stoker and Warren, both on 4th December, to which were appended confidential medical reports from those gentlemen to the plaintiffs. Both of them recommended the acceptance of Moran as a first-class life. The proposal was accepted, and the plaintiffs issued a policy in pursuance of it bearing date 2nd January 1908.

On that day Moran had made a further declaration as to his health, bringing his previous statements up to date, and concluding thus: "I agree that this Declaration shall be deemed to be incorporated with the said Proposal, and, together with the Proposal and Personal Statement referred to in the Proposal, shall form the basis of the contract, and that if this Declaration be untrue in any particular, the Policy to be issued in terms of the said Proposal shall be null and void."

The policy, after reciting that Moran had lodged the proposal and declarations of 4th December, and had made a personal statement to a medical officer of the Association "which proposal and declaration and personal statement formed the basis of the contract," and that he had paid the first annual premium, witnessed that, if the annual premiums should be duly paid, the Association would pay to his executors, administrators or assigns within one calendar month after his death, on the policy being delivered up duly discharged, the sum of £5,000, or such other sum as might be payable under the plaintiffs' articles of association and the conditions of the policy. It then proceeded as follows (so far as material):—

"Provided always that the sum assured shall not be payable until such proofs of the identity of the claimant, and of the validity of the claim, and of the age of the person assured, as the Directors shall consider necessary, shall have been deposited with the Association.

"Provided further that this Policy shall be subject to the

following conditions and to the conditions in the margin hereof or indorsed hereon:—

"1. This Policy shall be void, and all moneys which shall have been paid in respect thereof shall be absolutely forfeited to the Association, in any of the events specified under the following heads, that is to say:—

"(*a*) . . . .

"(*b*) If the Proposal or any other document upon the faith of which the Policy is granted shall contain any untrue statement, or if the person making the Proposal shall, with a view of obtaining the Policy, have made any false statement or been guilty of any concealment or misrepresentation."

There is no doubt that under this policy the truth of the allegations contained in Moran's declaration and personal statements was expressly warranted, so that if any of them was untrue the policy was not enforceable: *Thomson* v. *Weems* (1). The head-note to that case uses—somewhat unfortunately, I think—the words "the policy was absolutely null and void," upon which an argument has been founded which I regard as fallacious. As Lord *Blackburn* said (2):—"It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree, to make the actual existence of anything a condition precedent to the inception of any contract; and if they do so the non-existence of that thing is a good defence."

Such a contract is only void in the sense that it does not create any enforceable obligation unless the condition precedent is fulfilled. That it is not void in the sense of being a nullity is apparent from the consideration that the falsity of the statement must be set up by way of confession and avoidance, and not by a denial of the existence of any contract at all. This view of the law is very clearly expounded by *Story* J., delivering the judgment of the Supreme Court of the United States in the case of *Carpenter* v. *Providence Washington Insurance Co.* (3).

It follows that as soon as the plaintiffs executed this policy they had an insurable interest in Moran's life in respect of it.

(1) 9 App. Cas., 671. (2) 9 App. Cas., 671, at p. 683.
(3) 16 Peters, 495, at p. 509.

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(They had, in fact, already an insurable interest under the earlier policy.)

The nature of the risk which they undertook was that declared by the policy itself. Their liability to pay might come to an end by default in payment of premiums. If it did not so terminate, they would be liable to pay £5,000 at his death, unless they could prove that some untrue statement was contained in the documents made the basis of the contract. The real risk which they undertook, regarded as a matter of business, did not therefore depend upon the abstract truth or falsehood of the facts alleged by Moran, but upon their ability or inability to controvert them after his death, which was a very different thing.

On the same 2nd January the plaintiffs made a "proposal for re-assurance," *eo nomine*, to the defendants. The body of the proposal was in the form of answers to 13 specific questions, giving amongst other matters the name and age of the life proposed, the amount (£5,000) of the original policy and its date, 2nd January, on which date the risk under it was said to commence. The 13th question and the answer to it were as follow:

"13. What evidence of Health is offered?	Medical Reports by Drs. Henry Stoker and C. F. Warren of Wagga both dated 4th December 1907, also Health declaration by Assured dated 2nd January 1908."

The medical reports mentioned were in fact the personal statements made by Moran with the reports appended. I pause to note that amongst the evidence of health offered was included Moran's statement of 2nd January, which was not specifically mentioned in the original policy.

The proposal concluded with the following statement:—

"For all particulars in regard to health, habits, age and other information relative to the Life above described, reference is made to the Proposal and other Documents in possession of the National Mutual Life Association of Australasia Limited of which the originals or copies are herewith produced or referred to; and it is understood that in accepting the risk under this Re-assurance, the Australian Widows' Fund Life Assurance Society Limited

does so on the same terms and conditions as those on which the National Mutual Life Association of Australasia Ltd., have granted a Policy, and by whom, in the event of claim, the settlement will be made."

The defendants accepted this proposal, and issued to the plaintiffs the policy now in question, which first recited that the plaintiffs having an interest in Moran's life had "by a Proposal and Declaration" dated 2nd January 1908 applied to have his life assured by the defendants by effecting a policy on his life payable within one calendar month after proof of his death for the sum of £5,000. It then recited as follows :—

"And Whereas the Statements contained in, and in fact appearing upon, the Proposal and Declaration, together with those contained in, and in fact appearing upon, the copies of Personal Statements made to Doctors Stoker and Warren relating to the relative original Assurance are the basis of this Contract, and are to be deemed part hereof and to be incorporated herewith."

After a further recital that the defendants had "agreed to accept the proposal of the (plaintiff) Association" and that the latter had paid the first premium and agreed to pay future premiums the Policy proceeded :—

"Now this Policy witnesseth that in the event of the death of the 'Assured' while the Premiums as aforesaid are duly paid, the Society will pay to the Association the sum of Five thousand pounds within one calendar month after such evidence as the Board of Directors may consider necessary to establish the age, identity, and death of the Assured has been supplied to the said Society, on delivery of this Policy duly discharged," subject to a proviso that the amount payable by the defendants should not exceed that paid by the plaintiffs under the original policy.

It is not open to dispute that the contract between the parties is to be gathered from this policy together with the proposal which is recited in it as having been accepted, and which is incorporated by reference.

Moran died in May 1909, and the plaintiffs, upon whom a claim was made by his executors, came to the conclusion, after examination of all the evidence then available, that they were not in a position to dispute the truth of the facts as warranted

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by him. They accordingly paid the claim, and in turn made a claim upon the defendants, who repudiated it, on the ground that the plaintiffs had themselves independently warranted the truth of Moran's statements contained in the documents mentioned in the defendants' policy.

At the trial of the action the jury found that some of Moran's statements were untrue in fact. But they also found (in answer to question 17) that "the plaintiff Association in becoming satisfied of the validity of the claim of the executrix of Patrick Moran's Estate and in paying the same acted reasonably and in good faith and in the honest exercise of its discretion to settle such claim so as to bind the defendant Society if it in fact had any such discretion."

Madden C.J. gave judgment for the defendants, but this judgment was reversed by the Full Court (*Hodges* and *Hood* JJ., *à Beckett* J. dissenting).

The argument for the appellants is based upon the recital already quoted from the defendants' policy "Whereas the statements contained in, and in fact appearing upon, the Proposal and Declaration, together with those contained in, and in fact appearing upon, the copies of Personal Statements made to Drs. Stoker and Warren relating to the relative original Assurance are the basis of this Contract, and are to be deemed part hereof and to be incorporated herewith." It is contended that the matter is concluded by the use of the words "basis of this contract." But there is no magical efficacy in these words. What is their meaning and effect in any particular case "depends," as Lord *Blackburn* said, immediately before the passage I have already quoted from his speech in *Thomson* v. *Weems* (1), "on the construction of the whole instrument." No doubt the effect of these words is to make something a condition precedent. But what that something is remains to be ascertained. When a contract of insurance is made with a man on the faith of positive statements of fact made by him as to matters of which he has knowledge or means of knowledge, and which he agrees shall be the basis of the contract, the natural construction is that he warrants their truth, that is, agrees that their truth shall be a condition precedent. If,

(1) 9 App. Cas., 671, at p. 683.

on the other hand, the statements referred to are matters of which the person making the contract admittedly knows nothing, and if he gives the other party all the information he himself has on the subject and says that that information is to be the basis of the contract, this is no longer, to my mind, the natural construction.

And it is at this stage that the real nature of the transaction becomes important. The case of *Home Insurance Co. of New York* v. *Victoria-Montreal Fire Insurance Co.* (1) is instructive in this connection, as showing that words used in a contract of re-insurance do not necessarily bear the same meaning that they would have in an original policy, and may indeed be wholly disregarded if inconsistent with the plain intention of the parties as shown by the rest of the document.

I have already called attention to the fact that the plaintiff's proposal was headed "Proposal for Re-assurance." Again, in the concluding words of that document it is explicitly stated that "it is understood that in accepting the risk under this re-assurance the Australian Widows' Fund Life Assurance Society Limited does so on the same terms and conditions as those on which the National Mutual Life Assurance Association have granted a Policy." This is the proposal which the defendants accept.

The real nature of the transaction is therefore manifest. The contract is not one of original assurance or counter assurance, but of re-assurance, and on the same conditions as the original. In other words, the defendants agreed that they would accept as between themselves and the plaintiffs the identical risk which the plaintiffs had accepted, and that, if the plaintiffs should be bound to pay, they would indemnify them to the extent stipulated. It was essential to such a contract that the plaintiffs should put the defendants in possession of all the knowledge they themselves had, so that they might stand on equal terms as to knowledge of the risk which was undertaken. *A priori* it would seem unlikely that in such a transaction the original assurers should warrant the truth of the statements made to them by the assured. In another sense, however, the defendants had the full benefit of the warranty of the truth of Moran's statements, since

(1) (1907) A.C., 59.

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their contract was expressed to be on the same terms and conditions as the plaintiffs', so that they were, if there were no more in the case, entitled to set up Moran's breach of warranty as a defence to the action. The stipulation contained in the recital in the defendants' policy and relied upon by the defendants was, therefore, from this point of view, quite unnecessary.

Reading that recital in the light of the considerations to which I have just adverted, it seems to me that its natural meaning is that the information offered in answer to Question 13 as to Moran's health, and contained in and appearing upon the copies of Moran's personal statements was all the information which the plaintiffs possessed on the subject of his health, and that the "basis of the contract" intended was not the truth of Moran's statements, but the independent statements contained in the plaintiffs' proposal together with this information to be derived from Moran's statements. If it is read in the sense contended for by the defendants, it adds nothing to the stipulation on that point already contained in the proposal itself and incorporated in the policy.

It is to be noticed, incidentally, that the documents described in the answer to Question 13 as "Medical Reports" are the identical documents described in the policy as "personal Statements made to Doctors Stoker and Warren." I note, also, that Moran's statement of 2nd January is not mentioned in the recital.

Reference to other parts of the connected documents confirms this view. There is a marked difference between the promise to pay in the original policy and that in the defendants' policy. In the former it is a promise conditioned upon the truth of Moran's statements. In the latter it is a promise conditioned only upon proof of the age, identity and death of Moran. The only serious attempt made to answer this argument was a reliance upon the magic efficacy of the words "basis of contract."

Again: some effect must be given to the concluding words of the proposal incorporated in the contract, on which the majority in the Full Court laid great stress, namely, "by whom, in the event of claim, the settlement will be made." Revert for a moment to what I have said as to the real nature of the risk considered as a business proposition. It was to be expected that

when Moran died a claim would be made by his executors. The plaintiffs had agreed to pay within 30 days after death. If any circumstances were then known which would arouse suspicion, the plaintiffs would be called upon to investigate them, and, if they found that they could not substantiate any defence to the claim, they would have to pay. All this must have been in the minds of the parties, and it affords in my judgment the key to the meaning of the words I am discussing. All this work was to be left to the plaintiffs, and might be left to them with the more confidence because they had an independent risk on Moran's life for an equal amount. The appellants' counsel, when pressed with this argument, could only suggest that "settlement" meant "payment" and no more, and that the stipulation was intended to gratify the business vanity of the plaintiffs, or perhaps to exclude the application of a curious doctrine of law which prevails in some of the American States, by which the original insurer can sue the re-insurer on the policy of re-insurance. I cannot accept these suggestions.

On the other hand the defendants promised to pay on quite different conditions.

In my opinion the term "settlement" was intended to include the whole series of acts which naturally fall to be performed by assurers on whom a claim is made under a life policy, including the ascertainment of all facts relevant to the obligation to pay. The term is, at best or at worst, ambiguous, and, as said by Lord *St. Leonards* in *Anderson* v. *Fitzgerald* (1), the policy "is prepared by the Company, and if therefore there should be any ambiguity in it, must be taken, according to law, more strongly against the person who prepared it." This doctrine has often been recognized in England and the United States as particularly applicable to contracts of insurance.

The construction which I give to the policy makes all the provisions harmonious, and gives effect to what was obviously the intention of the parties. The jury found that the plaintiffs in making the settlement with Moran's representatives acted reasonably and honestly. In my judgment, therefore, the defendants are bound by the plaintiffs' settlement of the claim.

(1) 4 H.L.C., 484, at p. 507.

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I am not acquainted with any rule by which the intentions of the parties as collected from the whole of a contract may be overridden by a particular phrase disengaged from its context, on the ground that that phrase has been interpreted by a tribunal in a sense which is unalterable, and applicable to all cases whatsoever. For these reasons I think that the appeal should be dismissed.

BARTON J. On 4th December 1907 Patrick Moran made a proposal for life insurance, and with it two personal statements and a declaration, to the plaintiff Association, now respondents. Accepting the proposal, the Association issued to Moran on the 2nd January 1908 a life policy for £5,000. On the same date the Association made to the defendant Society, now appellants, a "Proposal for Re-assurance" (which speaks of "the sum to be re-assured," viz. £5,000, and "the risk under this re-assurance"), and on the 29th of the same month, January 1908, the defendant Society accepted the proposal and granted the plaintiff Association a policy re-assuring in the like sum their interest in Moran's life.

Moran died on 10th May 1909, and the sum originally assured to him was after objection and long investigation paid by the plaintiff Association to his executrix on 4th January 1910. They now seek to recover from the defendant Society a like sum on the policy of re-assurance. At the trial *Madden* C.J. put a number of questions to the jury which they answered. The answers included findings that some parts of Moran's personal statements to the doctors were untrue; and they answered in the affirmative this question: "Did the plaintiff Association in becoming satisfied of the validity of the claim of the executrix of Patrick Moran's estate and in paying the same, act reasonably and in good faith, and in the honest exercise of its discretion to settle such claim so as to bind the defendant Society if it in fact had any such discretion?" On the findings the learned Chief Justice gave judgment for the defendants. By a majority the Full Court has held that the plaintiff Association is entitled to succeed, and against that decision the defendant Society now appeals.

It cannot be doubted that the contract between the society and the Association is one of re-insurance, and as already pointed out

by my learned brother, the case of *Dalby* v. *India and London Life Assurance Co.* (1) has no bearing upon it. The contract effected by the Anchor Life Assurance Company with the defendants was not by way of re-insurance. It was merely as *Parke* B. described it, a counter insurance. It was an ordinary assurance on the life of the Duke of Cambridge, having no reference to any of the policies which the Anchor Co. had granted to the Duke. It would be impossible to hold such a contract to be one of indemnity. But the contract of re-insurance was not in question in that case.

Moran agreed to make his proposal and declaration, together with the two personal statements to Doctors Warren and Stoker, the basis of the contract with the plaintiff Association. In addition he made a "Health Declaration" on 2nd January 1908, the date of the issue of the policy to him, and he agreed that it should be incorporated with the proposal and, together with it and the other documents, should be the basis of the contract, and that, if it should be untrue in any particular, the policy should be null and void. There is no doubt that the statements in these documents together with the results of the medical examinations reported by the two doctors led to the proposal being accepted, as it was by the original policy.

Of that policy I need only mention at present that it recited that the proposal and declaration and personal statements formed the basis of the contract; and that it was a proviso that the policy should be void and all moneys paid in respect of it forfeited, "if the proposal or any other document on the faith of which the policy is granted shall contain any untrue statement or if the person making the proposal shall, with a view of obtaining the policy, have made any false statement or been guilty of any concealment or misrepresentation."

The plaintiff Association did not and could not contend that under these documents, so emphatically warranting the truth of Moran's statements made in them, the policy could be enforced if any such statement were proved untrue. The sum assured being *primâ facie* payable on death, the condition and its breach would have to be specially pleaded in defence to an action on the policy,

(1) 3 El. & Bl., 48.

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and affirmatively proved. On failure of such proof the representatives of the assured would of course recover, the statements of the assured being taken to be true until proved untrue. Although it was a condition precedent to the enforcement of the contract by a Court of Justice that Moran's statements should be true, it was not for Moran's executrix to show their truth but for the Association to show their untruth. Where such plea and proof are necessary to the defeat of the claim on the contract, it can hardly be said that the contract is void. It may prove to be inoperative unless the condition is complied with, and it often happens that a contract which cannot be enforced is loosely called void or invalid to denote its impotence.

This contract then was not void; far from it. Unless the plaintiff Association could prove the untruth of at least one of the statements which were the "basis of the contract," it would have to pay the sum assured by force of the contract. I think it is not strictly accurate to say that the mere untruth of a statement which is of the basis of the contract defeats the policy, unless the expression is used as to an untrue statement legally disproved in a Court; and even then the expression is correct only when the proof is accepted and acted on by the tribunal. This consideration is of much importance in the present case, because, as we shall see, one of the defendant Society's strongest contentions involves the assertion that, before the plaintiff Association could recover on the re-insurance policy, it would have to show that it had resisted the claim on the original policy unsuccessfully in a Court of Law. The defence cannot stop short of such an assertion.

I turn to the plaintiff Association's proposal for re-insurance, made on a form provided by the defendant Society. With the exception of the final paragraph, this proposal consists of a numbered set of statements made in reply to questions put by the defendant Society. In it the plaintiff Association, through their actuary, give the number and date of the original policy and its amount, state the sum to be "re-assured" at £5,000, the proposers retaining nothing of it at their own risk, and state that they hold on the life altogether £5,000. (It was explained that the plaintiff Association had granted two policies of £5,000 each to

Moran, but were re-insuring the whole amount of one, and retaining the other risk uncovered. The defendant Society therefore knew that if the plaintiff Association paid a claim on the policy re-insured, they would also have to pay on the other without any recourse.) Then to the question—"What evidence of health is offered?" the reply is made, "Medical Reports by Drs. Henry Stoker and C. F. Warren of Wagga, both dated 4th December 1907, also Health Declaration by Assured" (*i.e.*, Moran) "dated 2nd January 1908." Each medical report was written on the back of a sheet of paper containing in front a personal statement.

Much importance was attached by both parties to the final paragraph of this proposal. Of course in a proposal for re-insurance there could be no personal statement, or medical report, or declaration of health. Moran was not a party, and on the part of the re-insured it would have been incongruous and absurd. But this paragraph makes reference "for all particulars in regard to health, habits, age and other information relative to the life above described, . . . to the proposal and other documents in possession of the National Mutual Life Association of Australasia Ltd. of which the originals or copies are herewith produced or referred to, and it is understood that in accepting the risk under this re-assurance the Australian Widows' Fund Life Assurance Society Ltd. does so on the same terms and conditions as those on which the National Mutual Life Association Ltd. have granted the policy, and by whom, in the event of claim, the settlement will be made."

When the re-insurance policy was issued on the 29th January 1908, it recited that the plaintiff Association had "an interest in the life of Patrick Moran hereinafter styled the 'assured,'" and that the plaintiff Association had applied to have his life assured in the defendant Society by effecting a policy for £5,000 "payable within one calendar month after proof of his death." Then there was a recital which must be carefully compared with the last paragraph of the proposal, that "the statements contained in, and in fact appearing upon, the proposal and declaration together with those contained in, and in fact appearing upon, the copies of personal statement made to Drs. Stoker and Warren relating to the relative original assurance are the basis of this contract and

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are to be deemed part hereof and incorporated herewith." It was then recited that "the Board of Directors of the Society may agree to accept the proposal by the Association," and so on. The policy then witnessed that "in the event of the death of the assured while the premiums . . . are duly paid, the Society will pay to the Association the sum of £5,000 within one calendar month after such evidence as the Board of Directors may consider necessary to establish the age, identity and death of the assured has been supplied to the said Society, on delivery of the policy duly discharged." But the Society were not to pay more than the sum paid by the Association under the policy granted to Moran, irrespective of bonuses, in which the re-insurance policy did not participate.

On Moran's death, then, came the claim on his policy. The plaintiff Association paid the claim under circumstances which I will presently state, but the defendant Society have refused to pay in their turn, on the ground that, in the policy of re-insurance, by the recital I have quoted, "the statements contained in, and in fact appearing upon, the proposal and declaration—together with those contained in, and in fact appearing upon, the copies of personal statements . . . relating to the original assurance are the basis of the contract." No doubt they are, but what is the meaning of making those statements the basis of a contract as between the person to whom those statements were tendered and a person contracting to re-insure his risk? Let us consider the original position of the plaintiff Association in relation to Moran and the position which subsequently arose between them and the defendant Society. The statements made by Moran in the documents which were made the basis of the promise to him were on subjects of which he had some knowledge —in some cases intimate knowledge. He was giving information on these subjects to a body which could not be supposed to know anything about them, and which had, in most instances, if not in all, no present means of testing his assertions. A term that his statements on such questions should be the basis of the contract, amounts without question to a warranty of the truth of the statements, when the term is made between parties so placed as to means of knowledge. But the case is different when he who

has received such a warranty, say the plaintiff association, is contracting with another person unconnected with his original contractee, say the defendant Society. There he is still without positive knowledge or the means of knowledge, and the person or society to whom he makes a proposal to contract is in no better plight. But the first of these persons has such information, whatever its worth, as is afforded by the statements made to him by his own contractee. If he places that other person in the same position as himself, is a term that the information which he hands over is the basis of the contract to be read as a warranty of its truth? I think not. He is not in a position to warrant its truth, and the person to whom he hands the information knows that. The contract is founded on that information, not in the sense that its truth is guaranteed, but in the sense that it is the best information that the person giving it can command, information with which the recipient must be satisfied, since there is no better to be had between them. The words "basis of the contract" have not necessarily the same meaning in both cases, because they must be read in relation to their subject matter—which, in the first case, consists of known or discoverable facts, and, in the second case, only of what is reported. Take, then, in connection with the recitals in the re-insurance policy as to the statements of Moran, the concluding paragraph of the proposal for that policy. In the light of the position of the parties as I have described it, how is the phrase "the same terms and conditions" to be taken? The term that Moran's statements are the basis of the contract means, in the one case, that they are guaranteed facts. In the other case it means that they are the best information that the plaintiff Association has but are obviously not first-hand information. They cannot therefore be guaranteed. At this point we see the reason for the difference in the recitals of the two policies. In the original one, Moran's proposal and declaration and his personal statement, it is recited, form the basis of the contract. In the re-insurance, it is not these documents. If it had been intended to make them the basis, it would have been easy to say so. But it is "the statements contained in and appearing upon the proposal and declaration together with those contained in, and in fact appearing upon, the copies of personal statements,

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&c." The difference in the relative positions of the parties in the two cases and the consequent difference between things guaranteed as facts and mere second-hand information are enough to account for this difference of expression, which seems to distinguish deliberately between the knowledge of Moran at first hand and the complete disclosure of the information of the plaintiff Association a remove further from the source.

The language of the answer to the last question in the proposal for re-insurance appears to be quite consistent with this distinction, if it is not even suggestive of it. Of course the medical reports are the reports made upon the personal statements.

Now let us look at the operative part of each policy. In Moran's the sum assured is not to be payable except on proof of age, identity, and the validity of the claim and the truth of the proposal or any other document on the faith of which the policy is granted. In the re-insurance the only conditions are proof of the age, identity and death. Is it not rather curious that a condition alleged to be essential to both should be plainly stated in the one and not at all in the other ?

Then consider the words at the end of the plaintiff Association's proposal to re-insure. It is the Association " by which, in the event of claim, the settlement will be made." It was bound to pay on Moran's policy within a month of his death, on proof of age, identity and the validity of the claim, which includes death. This would require some part of the month, if it did not necessitate more time, as, indeed, it did. The parties knew this, and they knew that, if doubt arose as to the truth of Moran's statements, or as to his conduct, some one must investigate. The investigation had to be made by the plaintiff association as the party liable to Moran. Then the settlement must be made by the authority which investigated, and so it was provided. But settlement ordinarily has a wider meaning than payment, and that is made more evident in this instance. It seems absurd to say that here settlement means no more than payment. But if it means more, must it not import some kind of discretion ? It might be, as it often is, in the best interests of the assured to compound a claim—and it might here also be in the best

interests of the re-insurer. In either case it might save a protracted and precarious litigation. It was a sheer necessity that one of these bodies should have such an authority, and it was agreed to give it to the plaintiff association. They would have to inquire into all the facts from which payment of all or a part might become imperative or advisable, or from which the claim might be discovered to be unfounded. If such an authority were denied, and the matter rested on mere payment or repudiation, a case of suspicion, nay, of moral certainty that the original assured had made untrue statements without positive proof of their untruth, would probably lead to strange results.

What has happened in this case goes far to illustrate the necessity of the wider construction of the settlement. According to *Madden* C.J. in his charge to the jury, the evidence is that from Moran's death the plaintiffs and the defendants proceeded to make inquiry, acted together, and in the way that business people would act. His Honour supposed (no doubt upon the evidence) that "what they did was done carefully, continuously and industriously to get at the rights of it." They obtained clues from time to time. "They got suggestions of evidence, rather than the evidence itself, that Moran had fits, and it was suggested that he had all sorts of other things too, and they were unable to run any of them quite home, or indeed home at all; and they continued this up to 4th November" (1909).

His Honour also spoke of "the lack of discovery which" the plaintiffs' "many inquiries had demonstrated." Having done all this; having found that there was something suspicious, but that they could not prove affirmatively that any of Moran's statements were untrue; the plaintiffs rightly concluded that it would be futile to contest the claim at law. They were right in refusing to "chance it," because the onus of proof would have been on them. To contend that in these circumstances they were bound to fight an action is to contend that the re-insured are never justified in settling by payment even where defence is hopeless. It matters not that after the payment in January 1910 fresh facts came to light on which an action could have been defended. They were not forthcoming after eight months' delay, and surely that was a reasonable time to spend in search-

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ing for proof, and I think that the plaintiffs were entitled to settle as they did, knowing as they did that the settlement committed them to the payment of £5,000 on Moran's other policy, without recourse; that on the facts as then known, and considering the long investigation that had taken place, they acted rightly and discreetly in avoiding the expense of an action; and that the jury were amply justified in their answer to Question 17.

I think, therefore, that the defendants are bound by the settlement, and that the Full Court came to the right conclusion.

For these reasons I am of opinion that the appeal should be dismissed.

Isaacs J.

ISAACS J. I am of opinion that the judgment directed by *Madden* C.J. and the views of *à Beckett* J. in the Full Court were correct and that this appeal should be allowed.

The case turns principally on the meaning and effect to be given to two groups of words.

One is the second recital in the policy as to certain statements being the basis of the contract, and the other is the reference in the proposal to the terms and conditions and to the settlement in the event of a claim.

In effect the decision appealed from was that these two groups of words are so bound up and intermingled that they cannot be separated, and that the first is qualified and in fact overridden by the second so that whatever settlement was made by the respondents, honestly and reasonably in respect of their own policy, bound the appellants, not merely as to amount, but as to the very validity of the re-assurance contract. It is a startling proposition, and a novel one, that a settlement made by original assurers with the representatives of the original insured, of a claim under the original contract, not only in the absence, but notwithstanding the objection, of the re-assurers, can prevent the latter from contesting the validity of their own independent contract, notwithstanding the declared basis of both policies or even of one of them has failed.

The wording of a contract to have that extraordinary and unreasonable effect would have to be clear beyond possibility of question.

I should first notice an argument much relied on by the appellants in support of the view taken in their favour by the learned Chief Justice of Victoria and *à Beckett* J. I deal with this at the outset because it has colored and influenced some of the judgments which we have had to consider, and has I think to some extent diverted attention from the real point of the case, and has led to some unnecessary difficulties. In Australia (as in England—see *Bunyon on Life Assurance*, 4th ed., p. 83) re-insurances have now become exceedingly common and therefore it is most desirable to have no doubt on the subject.

The argument was that in all cases of re-assurance and apart from special stipulation the re-insurer in answer to a claim upon him by the re-insured is at liberty to set up every answer that the latter could have set up to a claim by the original insured. In support of this, two Victorian cases, *Universal Marine Insurance Co.* v. *Miller* (1), and *National Marine Insurance Co. of Australasia* v. *Halfey* (2) were relied on. Later cases to the same effect were referred to, as *Marten* v. *Steamship Owners' Underwriters Association* (3), and *China Traders' Insurance Co. Ltd.* v. *Royal Exchange Assurance Corporation* (4). But the cases referred to are based on marine insurance, not life assurance. The inherent nature of marine insurance is indemnity, whether the insurance is original or by way of re-insurance. A claim against a marine re-insurer can never exceed that against the re-insured, and therefore any answer by the latter is an answer against him. Of course it does not follow that is the only possible answer. See for useful recognitions of this principle: *In re Eddystone Marine Insurance Co.* (5), and *Allemannia Fire Insurance Co.* v. *Firemens' Insurance Co.* (6).

But the cases of *Dalby* v. *India and London Life Assurance Co.* (7) in December 1854, and *Law* v. *London Indisputable Life Policy Co.* (8) in January 1855, are authoritative expositions of the law that no such general rule can be predicated of life assur-

(1) 3 W.W. & àB. L., 139.
(2) 5 V.L.R. (L.), 226.
(3) 71 L.J.K.B., 718; 7 Com. Cas., 195.
(4) (1898) 2 Q.B., 187.
(5) (1892) 2 Ch., 423.
(6) 209 U.S., 326, at p. 332.
(7) 15 C.B., 365.
(8) 1 K. & J., 223.

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ance. I need merely refer to the judgments of *Parke* B. (1) in the former case, and *Page-Wood* V.C. (2), in the latter for the principles applicable to life assurance. See also *Bunyon*, 4th ed., pp. 31, 32. *Dalby's Case* (3) was one of re-insurance and was so treated. The whole question turned on the interest of the original insurers in the life of the Duke. I can see no difference between counter-insurance and re-insurance. A re-insurance is only an insurance "*contra*" or "against" the risk already undertaken by the re-insured. There is nothing else to which "counter" can be applied. The fact that a contract of life assurance is one of mere re-insurance of course makes it one of indemnity in this sense, that, unless the re-insured has, at the time of effecting it, a legal liability to his assured, he has no insurable interest, and equally of course the re-insurer is always at liberty to set up as against the re-insured whatever under the original insurance would negative the existence of risk when the re-insurance was effected. But, where the promise is to pay a sum certain upon death, that excludes the notion of indemnity as to amount unless there is something else in the contract to qualify it.

The requirement of insurable interest when effecting the re-insurance becomes of vital importance in the present case, as I view it. If the respondents at that time had no insurable interest, then that contract was illegal under sec. 121 of the *Instruments Act* 1890—an adoption of sec. 1 of the *Gambling Act*, (14 Geo. III. c. 48). And, if their original contract—so called—was void *ab initio* by reason of its "basis" having been shown to be non-existent, then the respondents never had any insurable interest. The respondents might waive their own rights under their own bargain with Moran; they might purposely or mistakenly act as if a binding contract existed, but they could not create retrospectively an insurable interest which did not previously exist, by converting that which was no contract at all into a binding obligation. Some stipulations, of course, might be waived, but a basic condition going to the very existence of any liability whatever is of so fundamental a character as to stand upon a different footing. Nor could the parties to the re-assur-

(1) 15 C.B., 365, at pp. 387, 391. (2) 1 K. & J., 223, at pp. 228 & 229.
(3) 15 C.B., 365.

ance, by any term of their own agreement, overcome the positive prohibition of the section referred to, which as a matter of public policy stamps certain assurances as invalid. And see sec. 123. This aspect of the result of the facts was not presented, but it is always the duty of a Court where the facts are fully ascertained to observe, and to refuse to assist, illegality. This duty has more than once been adverted to in this Court on the authority of cases which include *Gedge* v. *Royal Exchange Assurance Corporation* (1)—a case exactly in point though in marine assurance. See also *Luckett* v. *Wood* (2). The principle itself has been laid down by *Halsbury* L.C. for the Judicial Committee in *Connolly* v. *Consumers' Cordage Co.* (3) in these terms:—"Their Lordships entertain no doubt that it is the right and duty of the Court at any stage of the cause to consider, and, if it is fully proved, to act upon, an illegality which may turn out to be fatal to the claims of either of the parties to the litigation." Now here the facts have been fully ascertained as well as pleaded (pars. 9 and 10 of defence), and, if the law is as I think it is—that the truth of Moran's statements was made a condition precedent to the *existence* of any obligation to pay on his death, even though that were limited to the policy by the respondents, —it would be illegal to enforce the re-assurance policy, and no Court can permit itself to be made an instrument for aiding a breach of positive law, whether the parties desire it or not.

I shall examine the policy of re-assurance in order to ascertain the meaning of the two groups of words, and to discover whether they are so inextricably blended, as it is said they are, and whether the settlement provision overrides the "basis" stipulation or leaves it, as I think, with the same full force as in the original policy.

And when I deal with the question of the effect of a breach of the "basis" condition it will be understood I am doing so with reference to both policies, for the same facts and the same law apply to each alike.

The re-assurance policy follows a very common course. There are several recitals and it is very important to consider them in

(1) (1900) 2 Q.B., 214. (2) 24 T.L.R., 617.
(3) 89 L.T., 347, at p. 349.

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order. The first is that the respondents have an interest in Moran's life. The nature of that interest appears from the proposal. The recital goes on to mention the respondents' proposal and declaration by which they applied to assure Moran's life and this recital contains a statement which ought to be quoted in view of some of the observations in one of the judgments appealed from. The statement is that the proposal was for a policy payable within one calendar month after proof of death and for £5,000.

The second recital is of the very highest importance both to this and to all insurance contracts, and is in these terms:— "Whereas the statements contained in, and in fact appearing upon, the proposal and declaration together with those contained in, and in fact appearing upon, the copies of personal statements made to Doctors Stoker and Warren relating to the relative original assurance, are of the basis of this contract, and are to be deemed part hereof and to be incorporated herewith."

The recital was held by *Hodges* J. to be beside the real question, because he thought it subordinate to the "settlement" phrase in the proposal.

Hood J. considered the recital simply repeated that the policy and the contract are tied together. I am not sure I fully understand that expression. *àBeckett* J. thought this inextricable blending of the two groups rendered the stipulation as to the basis of the contract unmeaning. I agree with *àBeckett* J. and the recognized principles of insurance law seem to me entirely to support his view.

This second recital is an example of a common and almost universal practice to insert some stipulation of warranty as the foundation of an insurance contract. I should have thought a mere reference to the case of *Thomson* v. *Weems* (1) would have been sufficient to establish that the first duty of the Court is to examine into the truth of the warranty contained in that recital, and, if that be found untrue, to declare the whole contract null and void. But in view of the vigorous contention to the contrary by which that case is sought to be distinguished it is necessary to examine the matter on principle.

(1) 9 App. Cas., 671.

I apprehend that a person, when asked to enter into a bargain, may stipulate for any terms he pleases as a condition of assent; he may insist on a condition precedent, and may make that condition precedent to any stage or step in the arrangement. It may precede payment, or performance, or even the very existence of any binding contract whatever. The other party, if he accepts the promise, must accept it as made with all its stipulations. If it be a provisional promise, then unless the proviso be satisfied there is no absolute promise. *Pollock on Contracts*, 8th ed., p. 516, quotes a passage from a judgment to which I shall refer as follows:—"The intention of the parties governs in the making and in the construction of all contracts," and adds "This is the fundamental rule by which all questions, even the most refined, on the existence and nature of a contract must at last come to be decided." See also p. 560.

The onus of proof as to the satisfaction of the proviso depends upon the nature and construction of the agreement, but a provisional promise must not be confounded with an absolute though defeasible promise. A condition precedent to some later stage may leave the promise of the latter nature. And the danger of confusion between the two classes of agreements must be carefully guarded against. The all important question in this case is: What is the effect of a provisional condition once it is shown to be unfulfilled. The nature of such a stipulation as affecting contracts generally is evidenced by *Bannerman* v. *White* (1). There hops were purchased, but it appeared that before the price was asked by the defendants they enquired if sulphur had been used in their growth. The answer was "No," and defendants added that they would not ask the price if sulphur had been used. Then a sale took place on a sample. The defendants on being sued for the price pleaded (1) fraud, and (2) *non assumpsit*. The first plea was found for the defendants, so that it came to be a clear question of contract or no contract. *Erle* C.J. in delivering the judgment of the Court said (2):—"The effect is that the defendants required, and the plaintiff gave his undertaking, that no sulphur had been used. This undertaking was a preliminary stipulation; and, if it had not been given, the defendants would

(1) 10 C.B.N.S., 844.

(2) 10 C.B.N.S., 844, at p 860.

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not have gone on with the treaty which resulted in the sale. In this sense it was a condition upon which the defendants contracted; and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used. The intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute, with a warranty superadded; or the sale may be conditional, to be null if the warranty is broken. And, upon this statement of facts, we think that the intention appears that the contract should be null if sulphur had been used." On this ground the Court decided in favour of the defendants on the plea of *non assumpsit*. See *Pollock on Contracts* (8th ed.), pp. 577, 578, in accord with this.

Here we have the stipulation recorded in writing, and it cannot be any weaker because it is put in the document itself, and at the very threshold of the bargain. First it recites the proposal, next the preliminary stipulation, then the acceptance, then comes the promise and the qualification. All these are on the face of the writing for the Court to construe.

In *Anderson* v. *Fitzgerald* (1) Lord *Cranworth* L.C., speaking of a clause making the particulars in the proposal the basis of the contract said:—"The Company says that it will not contract with him till he shall answer certain questions which are made the basis of the contract."

That is equivalent to the expression "preliminary stipulation" of *Erle* C.J.

In such a case as the present, which is identical with the position put by Lord *Cranworth*, that is to say, a case where the warranty or condition is to attach at the very beginning of the risk and without which the risk is not to commence at all (for of course there are often cases where the warranty operates only after the risk has commenced), the law has been most clearly stated by Lord *Mansfield* in *De Hahn* v. *Hartley* (2) in these terms:—"A warranty in a policy of insurance is a condition or a contingency, and unless that be performed, there is no contract." In *Wedderburn* v. *Bell* (3) Lord *Ellenborough* speaking of sail

(1) 4 H.L.C., 484, at p. 502. (2) 1 T.R., 343, at p. 345.
(3) 1 Camp., 1, at p. 2.

equipment and sufficiency of crew said:—"These are conditions precedent to the policy attaching." In *Anderson* v. *Thornton* (1) a case of material misrepresentation, *Parke* B. said:—"The insurance never bound the defendant."

In *Thomson* v. *Weems* (2), Lord *Blackburn* says:—"It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree, to make the actual existence of anything a condition precedent to the inception of any contract; and if they do so the non-existence of that thing is a good defence." He is there alluding to the absolute promise to accept the risk. He continues:—"And it is not of any importance whether the existence of that thing was or was not material; the parties would not have made it a part of the contract if they had not thought it material." There he speaks of the contract as a whole including within itself the contingency provided for by its initial stipulation on which all else depends.

This agrees with the view of the Supreme Court of the United States in *Jeffries* v. *Life Insurance Co.* (3), where it is clearly and tersely stated:—"If the statements are not true, it is agreed that no policy is made by the Company, and no policy is accepted by the insured."

No doubt, when the policy is granted, albeit on the basis stated both parties, being honest, may be taken to assume the truth of the matter warranted, and so long as nothing appears to disturb that assumption of truth the contract is also assumed to be firmly based.

When, however, it is discovered that the assumption is wrong, that the "basis" was really non-existent, that the condition or contingency never arose on which alone the policy was to have any binding force whatever as an acceptance of risk, then, when that is shown, for it has to be shown, it is thereby established that in law there never was a contract to pay the insurance risk on death. And in such case, the policy being void *ab initio* and the risk never attaching, there never was any consideration for the premiums, and they being honestly paid under a mistake of fact are by the general law recoverable back. This is established

(1) 8 Ex., 425, at p. 428. (2) 9 App. Cas., 671, at p. 683.
(3) 22 Wall., 47, at p. 53.

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by many cases; including *Tyrie* v. *Fletcher* (1) and *Anderson* v. *Thornton* (2). The position is well summed up by Mr. *Sergeant Marshall* in his work on *Marine Insurance* 5th ed., (edited by Mr. Justice *Shee*), at p. 280, where among other observations, after saying that breach of warranty makes the contract void *ab initio*, he says :—"The warranty makes the contract hypothetical; that is, it shall be binding if the warranty be complied with." And see *Arnould on Marine Insurance*, 8th ed., paragraphs 324 and 632, in which exactly the same view is taken. I may add that the fact that the objection has to be proved by way of defence is no criterion of whether the contract ever existed, as is shown by *Pym* v. *Campbell* (3).

The failure of a basic condition is much stronger than mere collateral misrepresentation giving a right to avoid a contract which, even when all the facts are known, is in law a binding contract unless and until rescinded. The distinction is well recognized in *Attorney-General* v. *Ray* (4). There an assurance company, of which Ray was the public officer, obtained from the National Debt Commissioners some life annuity contracts on the life of a man named Thomas Chalk. By mistake, and entirely without fraud, they, thinking he was the same person as another of the same name, stated his age erroneously. After his death the Commissioners discovered the error, and a bill was filed asking for a declaration that the contracts for annuities were "void," and should be cancelled, and other consequential relief. *James* L.J., affirming *Hall* V.-C., said the sale should be set aside, and avoided on the ground of misrepresentation, and that all moneys paid by both parties should be given back, with interest. That was simple *restitutio in integrum*. *Mellish* L.J. agreed, but he made some additional observations most pertinent to the present point. He said (5) :—"I am disposed myself to go even further than that, and to say that it was an essential part of the contract itself that the representation should be true. It is the same thing as in an ordinary case of a policy of life assurance, where certain representations as to the age of the person insured, and as regards

(1) Cowp., 666.
(2) 8 Ex., 425.
(3) 6 El. & Bl., 370.
(4) L.R. 9 Ch., 397.
(5) L.R. 9 Ch., 397, at p. 407.

his state of health, are made the basis of the contract, and if they are not true the insurance office is not bound by the contract." And the Lord Justice, after referring to the Commissioners' statutory power to amend the contract in such a case, said (1):—"If they decline to amend the contract, the consequence is, that there has been *ab initio* no contract binding upon the Commissioners, and they are entitled to have it not merely set aside, but they are entitled to have an account of what money is due to them calculated upon that basis"—that is of course on the basis that there never was a binding contract.

But during the period while the policy is assumed to be a binding contract, the office has proceeded to incur expense in relation to the business; it calculates its profits upon it, declares bonuses, and regulates its affairs generally, even to paying premiums on a re-assurance, as if it were a sound transaction. It is therefore not an unfair stipulation—and so it has been found—to provide that, if the preliminary statements of the assured, which he has chosen to make, and on which the office has relied, should turn out to be incorrect, so as to prevent the transaction ever having force, he shall not prejudice the office by claiming back the premiums. But that does not otherwise affect the legal position caused by the failure of the basic warranty. The two things are distinct. See *per* Lord *St. Leonards* in *Anderson* v. *Fitzgerald* (2).

If this view be correct there never was, adapting the language of the Court of Appeal in *Mackenzie* v. *Whitworth* (3), "an interest in Moran's life created and evidenced by a binding legal contract between them" (the original insurers) "and Moran"; that is clear now that the facts are known, and consequently the respondents had no insurable interest when the re-insurance was effected, which ends the matter. See also *Arnould*, 8th ed., p. 422, par. 324. I therefore think the facts pleaded by, and proved under, pars. 9 and 10 of the defence are proved, and constitute a complete defence.

But as to the construction of the re-insurance policy this view must be further pursued. It leads to the result that, apart from

(1) L.R. 9 Ch., 397, at p. 408. (2) 4 H.L.C., 484, at p. 508.
(3) 1 Ex. D., 36, at p. 44.

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some unusual and controlling provision to the contrary, the words as to the settlement cannot be used to qualify the initial stipulation as to the basis of the contract. Those words do not come into operation at all until the "basis" stipulation is satisfied. Then, and only then, are they to be considered and as one of the terms of an operative contract.

In face of these considerations it would certainly require the most explicit and unmistakable provision to lead the Court to disregard and in effect nullify the second recital. It would need to be so clearly inconsistent with the very plain words of the "basis" group as to leave no room for discussion.

The incorporation of the statements in the proposal is assumed to have that effect. But in the first place the "proposal" as a whole is not expressed to be incorporated. It is the "statements" contained in it, which are incorporated, and made the basis of the contract. But what are the "statements"? I do not read the concluding clause of the proposal as among the "statements" which are made the "basis" of the contract, and if not, neither are they incorporated by the second recital. The "statements" referred to are the information which is furnished to the appellant Society to enable it to determine whether it will enter into the contract on the terms required. They are not an enumeration of the terms themselves. When we come to the next recital, the proposal is undoubtedly brought in as one of the constituent elements of the contract, but for a purpose entirely different from that served by the second recital. But, even if the proposal were fully included in the term "statements," there is nothing in its language when that is looked at which at all qualifies the primary effect of the "basis" recital.

The proposal submitted certain "statements" which the proposing Association of course knew would stand as the basis of any acceptance of risk and then said "it is understood that in accepting the risk under the re-assurance the" Society "does so on the same terms and conditions as the" Association "has granted a policy, and by whom, in the event of claim, the settlement will be made."

But those stipulations were by the very words of the proposal only to be "in accepting the risk." "Risk" means "the risk of

Moran's life falling in," which, apart from the inherent nature of of the transaction, is clear from questions 2 and 12 of the proposal. More accurately stating it, in *Bunyon's* words, 4th ed., p. 4, it is "the chance of having to pay the sum assured in every future year during which it is possible for the assured to live."

The risk commences from the time that there is a complete contract (*ib.* p. 85). So that the clause as to the understanding relative to the terms and conditions and the clause as to the settlement never come into play except as part of a complete and binding contract, creating a legal liability on the happening of the event assured against, to pay the sum assured, in other words, they operate only conditionally on the basic warranty being first satisfied. As Lord *St. Leonards* said in *Anderson* v. *Fitzgerald* (1) "it proceeds upon that warranty to grant the policy."

Nevertheless as Lord *Watson* said in *Thomson* v. *Weems* (2), we have still, for the purpose of interpreting the re-assurance policy, to enquire what is the subject matter of the warranty?

A contention was raised that the respondents did not warrant the truth of Moran's statements to the doctors, but warranted merely their own statements with respect to Moran's statements. I must confess my inability to understand that contention. When pressed to say what statements the respondents themselves made and are to be taken to warrant relative to the copies of Moran's personal statements, learned counsel for the respondents found themselves unable to give any intelligible reply. This arose of course entirely from the lack of material, nevertheless failure in this particular means a fatal ending for their case.

The proposal makes this statement:—"For all particulars in regard to health, habits, age or other information relative to the life above described, reference is made to the proposal, and *other documents in possession* of the National Mutual Life Association of Australasia Limited, of which the *originals or copies are herewith produced or referred to.*"

Copies of the personal statements made by Moran to the doctors were proved and are admitted to have been produced to the appellants, and included in the basic warranty.

(1) 4 H.L.C., 484, at p. 508. (2) 9 App. Cas., 671, at p. 687.

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Except stating that the originals were in their possession, and that these or copies were produced or referred to, the respondents made no statement whatever relative to Moran's personal statements—and so there was nothing to warrant. To give any fair meaning at all to the expression "those" (that is, the statements), "contained in and appearing upon the copies of personal statements made to doctors," &c., we must conclude that the warranty is as to the truth of Moran's statements. That is what the words naturally signify, and in such a case we can only judge of men's intentions by their words. Lord *Halsbury* L.C. said in *Thames and Mersey Marine Insurance Co.* v. *Hamilton* (1):—"It is to be remembered that what Courts have to do in construing all written documents is to reach the meaning of the parties through the words they have used."

It was suggested that the respondents could not be supposed to warrant these. Why not? They were asking for an insurance on Moran's life—the risk of which they would not and did not take without such a warranty, and which they could not expect the appellants, without the same warranty, to take at the same premium, obviously calculated on the same basis, and accompanied with really the same terms and conditions.

The appellants agreed to accept the risk and issued the policy for a premium calculated with reference to the life, in the ordinary way, and, as stated and admitted on both sides at the bar, the premium was precisely the same after allowing for profits. To assume, that the statements warranted as to the copies of personal statements were not Moran's statements, but merely the statements of the respondents that these documents were true copies of Moran's statements, would make the calculation of premiums depend on the good faith of the re-insurers, and entirely leave out of consideration the accuracy of all statements respecting the age, health, habits, and the personal and family history of Moran himself. If the appellants were content to rely on the mere fact of the respondents bearing a risk, why trouble at all about Moran's statements? but if requiring them, surely their truth must have been considered important. A rule that, notwithstanding such sweeping words as are present here, the pro-

(1) 12 App. Cas., 484, at p. 490.

ponent is not bound to actual truth, but merely to *bona fides* as to matters not supposed to be within his own knowledge—as, for instance, family history—would, I think, with all deference, revolutionize the law of life assurance.

The whole tendency and assumption of all the judgments in *Foster* v. *The Mentor Life Assurance Co.* (1) seem to me inconsistent with the suggested method of interpretation. None of the learned Judges in the Supreme Court thought it was right, and *Hodges* J., one of the majority in the Full Court, says "it is those statements by Moran that are the basis of the contract." The jury have found as a fact, and their finding is not contested, that Moran's statements were untrue. The warranty is therefore not satisfied, the basis of the contract was non-existent, and the contract was void *ab initio*; and so there is really no necessity to pursue any further the meaning and effect of the terms at the foot of the proposal. Still, in view of the circumstances, I should add a few words as to these.

The third recital is as to the respondents' acceptance of the appellants' articles, and the appellants' agreement to accept the respondents' proposal, and this necessarily introduces all its terms, including the words relied on; the fourth is as to payment of premiums. Then comes the operative part, the promise, namely, that in the event of Moran's death, while the premiums are duly paid, the appellants will pay to the respondents £5,000, and the nature of the "proof of his death," previously referred to in the first recital, is carefully specified, namely, "such evidence as the Board of Directors may consider necessary to establish the age, identity, and death of the assured." Much reliance was placed on these words by *Hodges* J., but their force is as I have stated.

Up to that point the policy, if in force at all, would bind the appellants to pay £5,000 within one month after death upon the specified proof being furnished; and that, whether the respondents paid on their contract or not, whether they compromised or not, and whether it had lapsed or not. If they had at the proper time the requisite insurable interest, their contract with the

(1) 3 El. & Bl., 48.

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appellants stood entirely on its own footing, the only "event" being Moran's death.

If, therefore, the promise had been left an unqualified one to pay the full £5,000 on Moran's death and on the specified proofs being furnished the provision in the proposal as to "settlement" would be devoid of any operation. The respondents would not need any protection. And such a provision would protect nothing. The "settlement" there spoken of is a settlement of a claim under the original contract; the promise to pay the respondent £5,000 is, under the re-assurance, an entirely different and separate contract (see *Nelson* v. *Empress Assurance Corporation Ltd.* (1)), which, though stated to be on the same terms and conditions as the original contract, is as independent as if those terms were so far as applicable written out in full.

But the policy does not stop there. The absolute and full promise of £5,000 is cut down by a proviso that "under no circumstances shall the amount payable by the Society on the death of the assured exceed that paid by the Association under its policy No. 207121 irrespective of any amount payable thereunder by way of bonus additions."

Now that establishes for the first time a limit of indemnity as to amount, by limiting the respondents' rights to what they "paid" under their own policy. That, in my opinion, unless qualified by some other provision, means "paid" under the original policy as a binding contract. The cases of *Chippendale* v *Holt* (2) and *Marten's Case* (3) support this view. Besides this the word "payable," which follows, indicates that payment is dependent on legal obligation to pay. But it must not be forgotten that it is simply the *maximum* limit of the amount payable should the liability to pay arise. It is not the measure of the obligation, it contains no promise to pay, it is altogether negative. But, as it fixes the limit of the obligation, it places the re-insured in a practical difficulty assuming they have a binding contract at all. They might pay reasonably under it and they might fail to obtain recoupment from the insurers.

There is a case reported of fire re-insurance in New Zealand—

(1) (1905) 2 K.B., 281.
(2) 65 L.J.Q.B., 104; 1 Com. Cas., 197.
(3) 71 L.J.K.B., 718; 7 Com. Cas., 195.

the *National Insurance Co. of New Zealand* v. *Australian Mercantile Union Insurance Co.* (1)—where part of the risk was re-insured "subject to the terms and conditions of the primary Company's policy and to settlement thereunder in case of loss." *Richmond* J. held that the settlement was "subject of course to the conditions of the original policy," and that "the re-insurers are bound by any fair and reasonable settlement which may be made in accordance with the terms and conditions of the original policy."

It would not be unreasonable or unjust to read the provision as to settlement in the way the somewhat similar words were read by *Richmond* J., that is, in working out and adjusting liability, the re-insured should be protected if acting honestly and reasonably. Less than £5,000 may be legally payable under clauses 1 (a), 1 (c), 2 and 3 and it would be extremely embarrassing for the respondents to pay what seems to them a correct sum under those clauses, and have their business calculations challenged by the appellants. The words it will be observed are "the settlement will be made," that is the settlement authorized by the contract. It is not "a settlement may be made," or "a settlement may be made which shall bind the re-insurers." It is really the bare statement of a truth, but it may be it is stated so that the appellants shall recognize that the respondents are to be as free to make a settlement consistent with the terms and conditions just mentioned—and always supposing the foundation of the whole transaction subsists—as if there were no re-insurance. On the other hand, it may be that a general form is adopted suitable to include cases of secondary re-insurance, such for instance as *Trail* v. *Baring* (2), and the phrase names for the information of the proposed re-insurer, and as a material circumstance, the office making the original insurance as the one by which in the event of a claim the settlement will be made. In such a case little or no doubt could arise as to its effect, and it probably, I think on the whole, was intended to have no further operation here. If so, the value of it to the respondents in this case disappears, but if not, in the view I take it confers no advantage upon them.

(1) 6 N.Z. L.R., 144, at p. 150. (2) 4 Giff., 485.

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If the doctrine of *contra proferentem* be applied it tells in this particular against the respondents.

Appeal dismissed with costs.

Solicitors, for the appellants, *Eggleston & Eggleston.*
Solicitors, for the respondents, *Madden & Butler.*

B. L.

[HIGH COURT OF AUSTRALIA.]

JOSKE . . . . . APPELLANT;
INFORMANT,

AND

STRUTT . . . . . RESPONDENT.
DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 14.

Griffith C.J., Barton and Isaacs JJ.

Dentist—Person "recorded" by the Dental Board—Use of words implying that he is practising dentistry—Dentists Act 1898 (*Vict.*) (*No.* 1595), *sec.* 7—*Dentists Act* 1910 (*Vict.*) (*No.* 2257), *sec.* 13.

Special leave to appeal from the decision of the Supreme Court: *Joske* v. *Strutt*, (1912) V.L.R., 118; 33 A.L.T., 189, refused.

APPLICATION for special leave to appeal from the Supreme Court of Victoria.

Oswald John Strutt, being a person whose name was recorded by the Dental Board of Victoria pursuant to sec. 13 of the *Dentists Act* 1910, was charged at the Court of Petty Sessions at