[HIGH COURT OF AUSTRALIA.]

CAMPBELL . . . . . APPELLANT;
PLAINTIFF,

AND

THE YORKSHIRE INSURANCE COMPANY LIMITED . . . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 29, 30; *Nov.* 5.

Barton, Gavan Duffy and Rich JJ.

Marine Insurance—Warranty—Proposal for insurance—Description of subject matter—Misstatement—Declaration as to truth of statements—Policy issued thereon—Validity of policy—Marine Insurance Act 1909 (*No.* 11 *of* 1909), *secs.* 32, 39, 41.

A policy of marine insurance on a racehorse was issued upon a proposal signed by the assured, which was the basis of and incorporated in the policy, and which amongst the words giving the description of the horse included a reference to its pedigree. In a subsequent part of the proposal there was a declaration by the proposer in the following terms:—"I the undersigned do hereby warrant and declare the truth of all the above statements." The horse died, and in an action brought on the policy it was found on the evidence that the pedigree was not truly stated.

Held, by *Gavan Duffy* and *Rich* JJ. (*Barton* J. dissenting), that the warranty contained in the declaration did not include the statement as to the pedigree; and that the statement as to the pedigree was merely part of the words designating the subject matter insured under sec. 32 (1) of the *Marine Insurance Act* 1909, and was not a warranty within the meaning of secs. 39 and 41 (1) of that Act; and that therefore the policy was not rendered void by the misstatement.

Decision of the Full Court of Western Australia reversed.

APPEAL from the Full Court of Western Australia.

A. D. Campbell, the plaintiff in an action in the Supreme Court upon a policy of marine insurance, had purchased for £400 in Sydney a racehorse which he wished to use in Western Australia, and to cover the risk of shipping it to Western Australia, he applied to insure with the Yorkshire Insurance Co. Ltd. by filling in a proposal in the following form:—

"Live Stock. Agency Beale & Co., 198 Pitt Street.

To Proposal for Sea Insurance.

"To The Yorkshire Insurance Co. Limited, 22 Bond Street, Sydney.

"Please insure the undermentioned interest per s.s. *Karoola* from Sydney to Fremantle *via* ports and for seven days after landing.

Color, Brands or Marks, &c.	Description of animals.	Cost on Board at Port of shipment (add freight if prepaid).	Amount proposed for insurance.	Warranty (see Clauses at foot.)	Remarks.
Bay Gel by Soult x S mare UЧY nr shoulder, 2 hind legs white, blaze on face, slight chip off knee Grey hairs nr side belly	ding t. Paul 5 yrs	£425	£425	A	purchased from Allcourt Rocky Point Rd Kogarah

"SUBJECT TO THE FOLLOWING WARRANTY.—That the said animal is well and free from disease and is carried in a horsebox or stall fixed to the satisfaction of this Company's representative at port of shipment and that sufficient provender for the said animal for the said voyage be shipped.

"Have you ever claimed under an insurance policy?—No.

"Claims payable at ( ) Sydney.

"Animals in charge of Ernest Bell.

"Ship to sail 22nd April, 1911.

"In the event of claim for death same to be proved by certified extract from the ship's log signed by the captain and chief officer of the vessel which must show the brand and distinctive marks and state cause of death.

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"Forms of certificate are supplied by the Company and in the event of mortality such forms must be fully and correctly filled in and certified to and furnished with claim in proof of death to the Company before any settlement can be made; otherwise subject to the Company's usual form of policy and special conditions either printed or written thereon.

"NOTE.—The proposer is alone responsible for the correctness of the description and other particulars set forth in this proposal and declaration. If the whole or any portion of the same be written by a canvasser agent or employee of the Company or by any other person whatsoever it is so written as agent for and on behalf of the proposer and shall have the same effect as if it was written by the proposer.

"DECLARATION.

"I the undersigned do hereby warrant and declare the truth of all the above statements that I have not withheld any important information and I agree that this declaration shall be the basis of the contract between me and the Yorkshire Insurance Company Ltd. subject to the conditions of the policy of the Company.

"Policy to be in the name of A. D. Campbell signature of the proponent Ernest Bell for A. D. Campbell.

"Witness to signature of proponent, P. H. Whitney, dated at Sydney 21st day of April 1911.

"MEMORANDUM Rate 4½%	£	s.	d.
Premium on £425	19	2	6
Stamp duty 3d.%	0	1	3
	£19	3	9 J. H. Beale.

"LIVE STOCK "All Risks" Clause "A."

"Transit Risks.—Each animal to be deemed a separate insurance. Subject to the terms and conditions of the Company's policy and including all risks of shipping including the risk of being slung overboard and whilst on board against all sea risks including jettison, washing overboard and mortality including all risks of maternity and lighterage animals walking ashore or when slung from the vessel walking after being taken out of the sling or box or if slung into the water swimming after leaving

the slings to be deemed arrived and no claim to attach to this policy on such animals.

"In the event of claim for death same to be proved by certified extract from the ship's log signed by the captain and chief officer of the vessel which must show the brand and distinctive marks and state cause of death.

"In the case of railway transit risks the policy also to cease to attach immediately the animals are safely landed from the railway trucks unless the insurance is extended by special warranty.

"LIVE STOCK "F.P.A." Clause "B."

"Covering general average but excluding general contribution for deck load jettisoned free of jettison and washing overboard and free from loss by death unless occasioned by fire stranding or sinking of the vessel or by collision with another ship or vessel. In all other respects this insurance is warranted free from all loss or damage excepting total loss by total loss to vessel only."

The Company thereupon issued a policy of even date, of which the following are the material clauses:—

"Whereas A. D. Campbell . . . hath caused to be delivered to the Company a proposal or statement in writing signed by or on behalf of the insured which proposal or statement the insured hath agreed shall be the basis of this policy and be considered as incorporated herein Now this policy witnesseth that subject to the conditions &c. . . . . insurance is hereby declared to be upon One Bay Gelding branded UЧY near shoulder two hind legs white blaze on face slight chip off knee grey hairs near side belly."

The horse, which was shipped on or about 21st April 1911, died on the voyage on 3rd May.

The plaintiff having duly claimed the amount of compensation, and the Company having denied liability on the ground, *inter alia*, of breach of warranty, the plaintiff brought an action against the Company to recover upon the policy. The case was heard by *McMillan* A.C.J. During the hearing a good deal of evidence taken on commission in Sydney and New Zealand was put in. His Honor held that although the description that the

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horse was by Soult ex St. Paul mare was incorrect and untrue it was not sufficient to avoid the policy, and gave judgment in favour of the plaintiff for £425 with interest at 6 per cent.

The defendant Company appealed from that decision to the Full Court of Western Australia (*Burnside* and *Rooth* JJ.), who allowed the appeal on the ground that the plaintiff had by his declaration in the proposal warranted the pedigree of the horse, which warranty had failed. Judgment was accordingly entered for the defendants.

From this decision the plaintiff now appealed to the High Court.

Haynes K.C. and *A. G. Haynes*, for the appellant. The proposal consists of three separate parts—description, warranty and statements. The pedigree is part only of description, and does not come within what is warranted by the declaration, which is intended to cover only the answers to the questions. But even if the pedigree be warranted, the onus is on the defendants to prove conclusively that the pedigree is wrongly stated: *Morris* v. *Davies* (1); *Head* v. *Head* (2); *Banbury Peerage Case* (3); *R.* v. *Luffe* (4). There is also the further point, that certain documents tendered at the taking of evidence on commission and not objected to there were wrongly admitted at trial where objection was taken on the ground that they were inadmissible as containing merely matters of hearsay.

Pilkington K.C. and *P. Stone*, for the respondents. As to objections to evidence, if the objection is not taken before the Commission, it is not admissible at the trial: *Robinson & Co.* v. *Davies* (5); *Hume-Williams and Macklin on Evidence on Commission*, p. 199.

[RICH J. referred to *Taylor on Evidence*, p. 390; English Order XXXVII., r. 12; *Richards* v. *Hough* (6).

BARTON J. referred to the *Yearly Practice* 1914, p. 539; *Lumley* v. *Gye* (7).

DUFFY J. referred to *Steinkeller* v. *Newton* (8).]

(1) 5 Cl. & F., 163, at p. 251.
(2) 1 Sim. & St., 150.
(3) 1 Sim. & St., 153; 24 R.R., 159.
(4) 8 East, 193, at p. 206.
(5) 5 Q.B.D., 26.
(6) 51 L.J.Q.B., 361.
(7) 23 L.J.Q.B., 112.
(8) 9 C. & P., 313.

The rule governing objections to evidence is stated in *Phipson on Evidence*, 5th ed., p. 447.

[They were stopped on this point.]

As to warranty, the rule is that apart from words of express warranty any statement bearing on the risk in a policy of marine insurance is *primâ facie* a warranty: *Thomson* v. *Weems* (1). The statement of the pedigree of a racehorse would certainly be material to the mind of an insurer when it is proposed to insure a horse of high value.

[DUFFY J. referred to *Marine Insurance Act* 1909, sec. 41.]

The warranty in the policy applies to all information supplied by assured.

Haynes K.C., in reply.

[RICH J. It is not every statement in a policy that is necessarily to be construed as a warranty: *Muller* v. *Thompson* (2).]

Cur. adv. vult.

Nov. 5.

BARTON J. This is an action on a marine insurance policy. The learned trial Judge found that the horse, the subject of the policy, was not truly designated as being by the stallion Soult out of a mare by the stallion St. Paul. These were noted racehorses. We have intimated that that finding should not be disturbed, as the learned Judges constituting the Full Court on appeal stated that it had been accepted before them by the parties as correct. Thus the case really resolves itself into one point. If the finding is material to the issue, as I think it is, there is only one question—whether the part of the description of the horse in which its parentage appears is one of the statements warranted by the proposal, and therefore to be exactly complied with: See *Marine Insurance Act* 1909, sec. 39 (3), which prescribes that in the absence of such compliance the insurer is discharged from liability.

The case thus resolves itself into a matter of construction, and with the exception that the policy incorporates the proposal by

(1) 9 App. Cas., 671. (2) 2 Camp., 610.

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stating that the insured has agreed that it shall be the basis of the policy "and be considered as incorporated therein," the only document to which it is necessary to pay any attention is the proposal itself. In that document under the combined headings of Colour, Brands, or Marks, &c." and "Description of animals" are written the words "Bay Gelding five years by Soult x St. Paul mare, UЧY nr shoulder, 2 hind legs white, blaze on face, slight chip off knee Grey hairs nr side belly." The exhibit shows the manner in which these columns were filled better than the copy transcribed, and I refer to the exhibit for the rest of the headings and the written words thereunder. Among other things there is a column headed "Warranty (see Clauses at foot)," and under this is written a capital "A." That is the letter designating the first of two clauses "at foot"—that is, coming after the "warranty and declaration" on which the defence is founded. Immediately after these headed columns are the following words:—"Subject to the following Warranty—That the said animal is well and free from disease and is carried in a horsebox or stall fixed to the satisfaction of this Company's representative at port of shipment and that sufficient provender for the said animal for the said voyage be shipped." There are other statements, that the insured has never claimed under an insurance policy, that the claims are to be payable at Sydney and that the ship is to sail on 22nd April 1911. Then comes the statement "In the event of claim for death same to be proved by certified extract from the ship's log signed by the captain and chief officer of the vessel which must show the brand and distinctive marks and state cause of death." Further, "Forms of certificate are supplied by the Company and in the event of mortality such forms must be fully and correctly filled in and certified to and furnished with claim in proof of death to the Company before any settlement can be made; otherwise subject to the Company's usual form of policy and special conditions either printed or written thereon." Then there is the word "Note" followed by these words:—"The proposer is alone responsible for the correctness of the description and other particulars set forth in this proposal and declaration. If the whole or any portion of the same be written by a canvasser agent or employee of the

Company or by any other person whatsoever it is so written as agent for and on behalf of the proposer and shall have the same effect as if it was written by the proposer." Then comes the cross heading " Declaration," and under it a very comprehensive warranty, reading thus:—"I the undersigned do hereby warrant and declare the truth of all the above statements and I have not withheld any important information and I agree that this declaration shall be the basis of the contract between me and the Yorkshire Insurance Company Ltd. subject to the conditions of the policy of the Company."

The conditions of the policy as thus mentioned may be disregarded for the purposes of the present appeal. This "declaration" is immediately followed by the witnessed signature of the proponent's agent, whose authority is not in question, and a memorandum of the premium on £425 and the stamp duty, signed by the insurer's Sydney agent. At the very end are the two clauses " A " and " B," for which, again, reference may be made to the document.

Now, the whole proposal is " the basis of the contract." Of course, there are some things which even so must be disregarded. The crucial words in this document are: " I the undersigned do hereby warrant and declare the truth of all the above statements." The words are not unlike some words in the proviso to the policy in *Anderson* v. *Fitzgerald* (1), which were held to include all false statements made in order to obtain the policy, whether in matters material or not. See the opinion of the Judges as delivered by *Parke* B. at p. 497. See also the *Marine Insurance Act* 1909, sec. 39 (3). The warranty, of course, does not include statements or promises which on their face emanate from the insurer; see also sec. 39 (1) of the Act, which expressly states that a warranty is " an undertaking by the assured." Hence the expression "all the above statements" must necessarily be read as " all *my* above statements."

On this matter of construction the contention for the respondent Company, based on the words of the " declaration " part of the proposal, " I the undersigned do hereby warrant and declare the truth of all the above statements," is that this warranty

(1) 4 H.L.C., 484.

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includes the descriptive statement concerning the parentage of the horse. On the other hand, it is said by the appellant that the words beginning thus, "Subject to the following warranty," coming as they do after and not before the headings and columns that include the description of the horse's parentage, have the effect of excluding the description as to the parentage from the statements warranted by the "declaration" part of the proposal. Those are the two main contentions.

As to the words "I warrant and declare the truth of all the above statements," I cite the words of Lord *Blackburn* in *Thomson* v. *Weems* (1): "In policies of marine insurance I think it is settled by authority that any statement of a fact bearing upon the risk introduced into the written policy is, by whatever words and in whatever place, to be construed as a warranty, and, *primâ facie* at least, that the compliance with that warranty is a condition precedent to the attaching of the risk." I think the law there laid down is the law laid down in the *Marine Insurance Act*. The expressed purpose of the *Marine Insurance Act* of England stated in the title is to "codify" the law relating to marine insurance, and in every material particular the Commonwealth Act is a copy of that Act, though the title is "An Act relating to Marine Insurance." I read Lord *Blackburn's* words "bearing upon the risk" as meaning "having some relation to the risk." To be a warranty, the statement need not be material to the risk. But it must, as I take it Lord *Blackburn* meant, be upon some subject not wholly foreign to the risk. The *Marine Insurance Act* does not expressly require that a statement, in order to be a warranty, must bear upon the risk. It probably assumes that the parties will contract only upon the business with brings them together. If it be necessary to show that these words of description concerning the parentage of the insured horse do bear upon the risk, it will appear in this way. *Primâ facie* the insurer will exact a larger premium for insuring a racehorse than he will for the insurance of a buggy horse, for this good reason, that he will want a premium according to the value named by the proposer as the sum to be assured. Then ordinarily he will not insure a horse at racehorse figures unless

(1) 9 App. Cas., 671, at p. 684.

he has some assurance of its being a horse of racing breed or one with a racing career. The statement is therefore likely to influence the mind of the insurer in coming to a decision whether he will accept the risk tendered him or not. This statement, then, about the horse bears upon the risk, and although it is not necessary so to decide, I should think that it is material to the risk. But in any view it is a statement made in order to obtain the policy. Adverting again to the words describing the parentage of the horse, I refer to the case of *Muller* v. *Thomson* (1). There the subject matter of the insurance was declared to be "the cargo, being 1031 hogsheads of wine valued at £16 per hogshead." That description was held by Lord *Ellenborough* to mean that the insurance should attach not upon the whole cargo, but merely upon that part of the cargo which consisted of 1031 hogsheads of wine, which was nearly the whole of the cargo. His Lordship does not appear to have questioned that the description of the subject matter was in itself a warranty, or to have suggested that if the description had been meant to cover the whole cargo (in which case it would not have been true, since there were also eight cases of manufactured goods carried) the policy could not have been avoided. The description was clearly a warranty, whichever of the contested meanings it bore, and the question was only as to the extent of its meaning in using the words "the cargo." That case, instead of being an authority against the respondents, is rather in their favour.

A statement is, of course, not necessarily a description, but a description is a statement, and therefore the description of the parentage of the horse in this case is covered by the words "all the above statements." That it is a warranty is thus clear, unless it is intended by the parties to be deprived of that character by the use of the words beginning "Subject to the following warranty," which are placed after the description. Do these other words show that it is not a statement covered by the words headed "Declaration"? Now we must look for a construction of this document which will give due effect to all its words. Does the paragraph which begins with "Subject to the following warranty," coming as it does immediately after the descriptive

(1) 2 Camp., 610.

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statement as to the horse's parentage, take that statement out of the category of "warranted" statements? Looking at the whole document, I think the words "Subject, &c.," are nothing more than words of emphasis in regard to what immediately follows them, and are not words of exclusion as regards the warranty which precedes them. If only that which follows them and not that which precedes them was meant to be warranted, it was unnecessary to warrant the truth of "all the above statements," since upon that supposition the "above statements" thus limited, were already warranted. The declaration made by the assured is not the less a warranty of all the statements by the insured that precede it, because in part of the contract there appear the words "subject to the following warranty." That, to my mind, is the introduction to a passage to which the insurer, who tenders the document for the proposer to execute, wishes him particularly to attend, and to avow its truth if he executes the proposal, because it relates to the condition in which the horse is shipped and the manner in which he is to be stalled and fed on the voyage.

I think, therefore, that if we are to give effect to all the terms of the contract, the words "Subject, &c.," which are urged upon us as detracting from the effect of the later "Declaration," are not used for the purpose of showing that the "warranted" words which immediately follow them are the only warranty in the contract, but that they are words of warranty to which the particular attention of the assured is intentionally directed. But they are not the only warranty, as the appellant contends, and they leave intact the ordinary meaning of the words of general warranty at the end. The latter are in point of fact a declaration on the part of the assured that whatever emphasis has been laid on any antecedent part of the contract, nevertheless the asseverance of truth applies to all the statements which can be taken as warranties. As the parentage is the subject of a statement, that statement is made a warranty. I think it would be one in any case, as the respondent Company maintains, although that argument is not necessary to it if the appellant has contracted that it shall be one. It is true that the word "warranty" is not used in these words of description; but I think that in

view of their tendency to influence the insurer to accept the risk at the sum proposed, they are intended to be a warranty that the bay gelding's sire was Soult, and his dam a St. Paul mare. So far at least as any term of description goes, in such a contract, to draw attention to the value of a horse as shown by his breeding and his performances, it tends to influence the mind of the insurer in the manner I have stated. It tends to bring about the granting of the policy, and it seems to me that it is impossible to deprive such terms of their character of a warranty *in se*.

This is a case in which a more expanded judgment might perhaps be excusable. But it is enough to state the opinion that these words describing the horse's parentage are constituted not only a warranty by the words of the declaration, but that they are one in themselves, and are, as is common to most warranties of this kind, a condition of the contract, and unless that condition is fulfilled the contract is avoided. It may be urged, and very properly urged, that these policies place the assured in a position of great hardship. Often the proponent is an unlearned man, apt to sign documents tendered to him without much reflection upon their contents, or upon the extent to which their terms may afterwards place his claim in peril. On the other hand, frauds on insurance companies have been frequent, and it seems as if companies had adopted forms which are very rigid and very exacting, for the purpose of enabling themselves to take objections founded thereon when they are morally certain of good reasons for refusing to pay, although they might not be able to prove them. I am not to be taken as defending this course. And I wish to say that whether this class of documents is to retain its strictness or not, it might be made easier for the ordinary layman to understand them before he undertakes the extensive warranties which they embody. I do not single out the policy and proposal of the respondent Company for criticism. One is not surprised if the layman shrinks from the task of expounding insurance documents to himself, for they are sometimes very difficult for the lawyer to construe.

In the present case I do not think that the proposal is ambiguous in the contested passages. It is difficult to interpret. But I am of opinion that one argument as to the construction

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overbears the other; that they are not equally open; and so I think that the contract is not ambiguous, although difficult.

I am therefore of opinion that the judgment of the Full Court ought to be upheld. As, however, I am not in agreement with the majority of the Court, the appeal will be allowed.

Gavan Duffy J. Rich J.

The judgment of GAVAN DUFFY and RICH JJ. was read by

GAVAN DUFFY J. In this case the sole question for our consideration is whether the plaintiff warranted the gelding the subject matter of the insurance to be "by Soult x St. Paul mare."

The case for the defendants was put to us in two ways in the able address which we heard from Mr. *Pilkington*.

First, it was said that these words are included in the statements warranted by the declaration contained in the plaintiff's proposal for insurance, which is the basis for the policy and to be considered as incorporated therein, and which runs thus:—"I the undersigned do hereby warrant and declare the truth of all the above statements."

Second, it was said that the words are in their nature such that they must be regarded as containing a warranty because they relate to matters which would necessarily affect the defendants' officers in exercising their discretion to accept or reject the proposal; and *Thomson* v. *Weems* (1) was relied on as an authority for this contention.

The phraseology of the proposal which is filled in in a printed form supplied by the defendants is obscure and ambiguous, but on the whole we are not satisfied that the warranty contained in the plaintiff's declaration has any reference to the words "by Soult x St. Paul mare." In our opinion it refers only to the statements appearing in the proposal after the words "Subject to the following Warranty." Even if the warranty were read as applying to statements contained in the earlier part of the proposal we do not think it would apply to the statement now in question, which is merely part of the description of the thing insured. If this is conceded the second contention must go with the first. Where the plaintiff has in express words warranted

(1) 9 App. Cas., 671.

certain statements excluding the statemen as to the gelding's pedigree it is hopeless to contend that he has also warranted the truth of that statement. There is no reason left for inferring an intention to warrant, and without this there can be no warranty. The whole of the words "Bay gelding by Soult x St. Paul mare UЯY nr shoulder, 2 hind legs white, blaze on face, slight chip off knee Grey hairs nr side belly" are words designating the subject matter insured under sec. 32 (1) of the *Marine Insurance Act* 1909, and are not a warranty within the meaning of secs. 39 (1) and 41 (1) of that Act.

The appeal should be allowed, and the original judgment restored.

Appeal allowed. Order appealed from discharged with costs, and judgment of McMillen A.C.J. restored. Respondents to pay costs of appeal.

Solicitors, for the appellant, *R. S. Haynes & Co.*

Solicitors, for the respondents, *Parker & Parker.*

A. L. C.