Commonwealth Parliament, has been actually exercised, and until it has been it cannot be prayed in aid. No doubt the Act of 1900 contains large powers of moulding the Constitution. Those who framed it intended to give Australia the largest capacity of dealing with her own affairs, and the Imperial Statute enables her to act without coming to the mother Parliament. But the people of Australia have elected to put into the Act restrictions on change of another kind. Their Lordships are called on to interpret the legislative compact made between the Commonwealth and the States, and they have to determine on the language of the Statute what rights of legislation the federating Colonies declared to be reserved to themselves. It is clear that any change in the existing distribution of powers has been safeguarded in such a fashion that on a point such as that before the Board the Commonwealth Parliament could not legislate so as to alter that distribution merely of its own motion.

Nor, in their Lordships' opinion, is the question carried further by sub-head xxxix., which declares to be within the legislative capacity of the central Parliament matters incidental to the execution of any power vested by this Constitution in the Parliament, or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth. These words do not seem to them to do more than cover matters which are incidents in the exercise of some actually existing power, conferred by Statute or by the common law. The authority over the individual sought to be established by the Royal Commissions Acts, the new offences which they create, and the drastic powers which they confer, cannot, in their Lordships' opinion, be said to be incidental to any power at present existing by Statute or at common law. A Royal Commission has not, by the laws of England, any title to compel answers from witnesses, and such a title is therefore not incidental to the execution of its powers under the common law. And until the Commonwealth Parliament has entrusted a Royal Commission with the statutory duty to inquire into a specific subject legislation as to which has been by the Federal Constitution of Australia assigned to the Commonwealth Parliament, that Parliament cannot confer such powers as the Acts in

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question contain on the footing that they are incidental to inquiries which it may some day direct. Having arrived at this conclusion, their Lordships do not think that the Royal Commissions Acts in the form in which they stand, could, without an amendment of the Constitution, be brought within the powers of the Commonwealth legislature. Their Lordships hesitate to differ from Judges with the special knowledge of the Australian Constitution which the learned Judges of the High Court and not least the Chief Justice and *Barton* J. possess, but the question they have to decide depends simply on the interpretation of the language of an Act of Parliament, and in the present case they have formed a definite opinion as to the interpretation which must be placed on the words used. Without redrafting the Royal Commissions Acts and altering them into a measure with a different purpose, it is, in their Lordships' opinion, impossible to use them as a justification for the steps which the Royal Commission on the sugar industry contemplates in order to make its inquiry effective. They think that these Acts were *ultra vires* and void so far as they purported to enable a Royal Commission to compel answers generally to questions, or to order the production of documents, or otherwise to enforce compliance by the members of the public with its requisition.

It will be sufficient to make a declaration to this effect with liberty to apply to the High Court to enforce it by injunction or otherwise. Their Lordships will therefore humbly advise His Majesty that such a declaration should be made, and that such liberty to apply should be granted, and that the Order of the High Court should be varied accordingly. As the respondents have substantially succeeded the appellants must pay the costs of this appeal. The costs of the application of the 10th June 1913 will be costs in the appeal.

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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 HIGH COURT OF AUSTRALIA.

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April

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

A., a life assurance company, issued a policy of assurance for a certain sum with bonuses 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 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

*Present—Viscount Haldane L.C., Lord Dunedin, Lord Shaw, Lord Moulton, and Lord Parker of Waddington.

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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 by his representative against A., and, investigation having failed to disclose evidence upon which in A.'s judgment a successful defence could be founded, A. paid to M.'s representative the whole amount payable under the original policy. A. then brought an action against B. to recover the sum assured by B., in which the jury found that some of the statements made by M. in his personal statement were false, 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 that, even assuming that all the terms of the proposal for re-insurance were incorporated in the policy, that policy was nevertheless conditional upon the statements in the personal statement of M. being true, and that on the facts found by the jury B. was never at any time liable on the policy.

Decision of the High Court: *Australian Widows' Fund Life Assurance Society Ltd.* v. *National Mutual Life Association of Australasia Ltd.*, 14 C.L.R., 141, reversed.

APPEAL from the High Court.

This was an appeal by the defendants to the Privy Council from the decision of the High Court: *Australian Widows' Fund Life Assurance Society Ltd.* v. *National Mutual Life Association of Australasia Ltd.* (1).

The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. The facts out of which this appeal arises are shortly as follows:—The respondent Association, having granted to one Patrick Moran a policy of assurance on his life for £5,000 with profits, re-insured his life with the appellant Society for the same amount without profits, the liability of the re-insurers being expressly limited to what was paid (irrespective of bonus additions) under the original policy. Patrick Moran died, and the respondent Association having, notwithstanding the protest of the appellant Society, paid to his legal personal representa-

(1) 14 C.L.R., 141.

tive the sum of £5,000, sued the appellant Society for that amount under the policy of re-insurance. The appellant Society contended that its liability under the policy of re-insurance, as also the liability of the respondent Association under the original policy, was conditional on the truth of certain statements made by Patrick Moran when he effected the original policy, and that these statements were false, and false to his knowledge. The respondent Association put the falseness of these statements in issue, and further alleged that whether the statements in question were true or false it had acted reasonably and in good faith in admitting and settling the claim on the original policy, and that the appellant Society was under the terms of the policy of re-insurance bound by such settlement and could not rely on the untruth of the statements in question. The action was tried before the Chief Justice of Victoria and a special jury. The jury found the statements in question to have been false, and false to the knowledge of Patrick Moran, but they also found that the respondent Association in settling the claim on the original policy acted reasonably and in good faith and in the honest exercise of its discretion to settle such claim so as to bind the appellant Society, if it in fact had any such discretion. On these findings the Chief Justice dismissed the action, holding that on the true construction of the policy of re-insurance the liability of the appellant Society was conditional on the truth of the statements which the jury had found to be false, and that the appellant Society was not bound by the settlement effected by the respondent Association of the claim against it on the original policy. On appeal the Full Court of Victoria by a majority reversed the decision of the Chief Justice, and directed judgment to be entered for the respondent Association for the amount claimed (1). The High Court of Australia by a majority confirmed the decision of the Full Court, and the appellant Society is by special leave appealing from the order of the High Court. The result of the appeal depends entirely on the construction to be placed on the two policies and in particular on the policy of re-insurance. Their Lordships will therefore proceed to examine the terms of these documents in greater detail.

(1) (1911) V.L.R., 466; 33 A.L.T., 93.

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The original policy was dated 2nd January 1908. It recited that the assured had lodged with the respondent Association a proposal and declaration and had made a personal statement to a medical officer of such Association, which proposal, declaration and personal statement formed the basis of this contract. By the operative part of the policy the respondent Association contracted to pay the sum assured or other the moneys payable thereunder within one calendar month after the death of the assured, with a proviso postponing payment until such proof of the identity of the claimant, the validity of the claim, and the age of the assured as the directors should consider necessary had been deposited with the Association. The policy contained a clause to the effect that the policy should be avoided and all moneys paid thereunder forfeited to the Association in any of the events therein specified, that is to say, (*a*) if any premium should be unpaid for thirty days after it became payable but so that if the policy had a surrender value such surrender value should be applied by the directors in payment of the premium in arrear; (*b*) if the proposal or any document on the faith of which the policy was granted contained any untrue statement, or if the person making the proposal had with a view of obtaining the policy made any false statement or been guilty of any concealment or misrepresentation, and (*c*) if the person assured committed suicide within thirteen months from the date of the policy, with a proviso for the protection of *bonâ fide* assigns for value. The policy also contained a clause reducing the sum assured and the amount payable in respect of profits, if the age of the assured had been understated.

It is not, and in their Lordships' opinion, having regard to the principle laid down in *Thomson* v. *Weems* (2), could not be disputed, that under this policy the liability of the respondent Association was conditional on the truth of every statement of fact contained in the several documents made the basis of the contract, except the statement as to the age of the assured, with regard to which special provision is made. The assured had, as a matter of fact, made two personal statements, one to Dr. Stokes and one to Dr. Warren, each of these gentlemen being a medical officer of the respondent Associa-

(1) 9 App. Cas., 671.

tion. Both statements were substantially to the same effect, and one of them (it does not matter which) is no doubt the statement referred to in the policy.

The policy of re-insurance was dated 29th January 1908. It recited that the respondent Association having an interest in the life of the assured had, by a proposal and declaration dated 2nd January 1908, applied to the appellant Society to have such life assured in the appellant Society by effecting a policy on such life payable within one month after proof of the death of the assured. It also contained a recital that the statements contained in the proposal and declaration, together with the statements contained in the personal statements made to Drs. Stokes and Warren already referred to, were the basis of the contract, and were to be deemed to be part thereof and incorporated therewith. It further contained a recital that the appellant Society had agreed to accept the proposal of the respondent Association. By the operative part of the policy the appellant Society contracted that, in the event of the death of the assured while the premiums under the policy were duly paid, the Society would pay to the Association the sum of £5,000 within one calendar month after such evidence as the Board of Directors of the appellant Society might consider necessary to establish the age, identity, and death of the assured, had been supplied to the Society: Provided that under no circumstances should the amount payable by the Society exceed that paid by the Association under the original policy irrespective of any amount payable thereunder by way of bonus.

Apart from any inference to the contrary to be drawn from the recital that the appellant Society had agreed to accept the proposal of the respondent Association, it was not and indeed it could not be disputed that the liability of the appellant Society under the policy of re-insurance was conditional on the truth of the statements made the basis of the contract. Further, apart from any effect to be attributed to this recital the terms of the policy of re-insurance differ in almost every particular from the terms of the original policy. The basic conditions are different. The premiums are different. The original policy allows, but the policy of re-insurance does not allow, a period of grace for the payment of premiums. The moneys

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assured differ in amount and are payable at different dates. The persons to determine the sufficiency of the evidence as to the age, identity, and death of the assured are different. The original policy contains a number of special provisions which are not contained in the policy of re-insurance. Everything therefore points to the policy of re-insurance being an independent contract of assurance rather than a contract of indemnity. Even the provision limiting liability under the policy of re-insurance to the amount paid under the original policy would be unnecessary if the contract were one of indemnity only. It is in their Lordships' opinion important to remember all this in considering the effect of the recital last referred to.

It was admitted by the appellant Society in the pleadings, and assumed throughout the proceedings in the Courts below and in the arguments before their Lordships' Board, that the effect of this recital was to incorporate in the policy all the terms of the proposal for re-insurance dated 2nd January 1908. Their Lordships are not satisfied that the recital has any such effect. The recital may very well mean that the directors of the Society have determined to accede to the application of the respondent Society for a policy of re-insurance, leaving the terms on which such policy was granted to be specified in the ordinary way in the policy itself. According to the preceding recital the policy is to incorporate the statements contained in the proposal and not the proposal itself. Having regard however to the admission in the pleadings, their Lordships will assume that the recital has the effect of incorporating in the contract the terms and conditions of the document of 2nd January 1908.

The document of 2nd January 1908 contains the following clause :—" It is understood that in accepting the risk under this re-assurance the Australian Widows' Fund Life Assurance Society Limited " (*i.e.*, the appellant Society) " does so on the same terms and conditions as those on which the National Mutual Life Association of Australasia Limited " (*i.e.*, the respondent Association) " have granted a policy and by whom in the event of claim the settlement will be made."

Suppose then that this clause had actually been repeated in the