purchaser in these circumstances to communicate this limitation to the vendor, but he remained silent throughout until after he had received one lot of cattle and determined to reject the other.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, the judgment of the High Court of Australia set aside with costs, and the judgments of the Supreme Court of Queensland restored. The respondent will pay the costs of the appeal.

[PRIVY COUNCIL.]

THE YORKSHIRE INSURANCE COMPANY LIMITED . . . . . } APPELLANTS;

AND

CAMPBELL . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT.

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 statement of 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 upon the policy it was found on the evidence that the pedigree was not truly stated.

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*Present—Lord Buckmaster L.C., Lord Atkinson, Lord Shaw and Lord Sumner.

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Held, that the warranty contained in the declaration included the statement as to the pedigree and was a warranty within the meaning of secs. 39 and 41 of the *Marine Insurance Act* 1909, and, therefore, that the policy was void.

Decision of the High Court: *Campbell* v. *Yorkshire Insurance Co. Ltd.*, 19 C.L.R., 166, reversed.

APPEAL from the High Court.

This was an appeal by the Yorkshire Insurance Co. Ltd. to the Privy Council from the decision of the High Court: *Campbell* v. *Yorkshire Insurance Co. Ltd.* (1).

The judgment of their Lordships was delivered by

LORD SUMNER. The point in this case is the construction of a policy of marine insurance on a horse shipped from Sydney, New South Wales, to Perth, Western Australia. Secs. 39 and 41 of the *Marine Insurance Act* 1909 state the law. The insurance is effected in a form more common in accident than in marine insurance. The intending assured subscribes a proposal in the insurer's printed form, and when the risk has been accepted the policy issued incorporates this proposal. The policy itself is similar to those of most marine insurance companies. What the appellants have to establish, following the wording of the Statute, is that there is expressed on the face of this policy, as the effect of this incorporation of the proposal, a form of words from which an intention may be inferred that the assured affirms, by way of promise, the existence of a particular state of facts, viz., that the horse was by Soult out of a St. Paul mare, and was 5 years old. At the trial the Acting Chief Justice of Western Australia and, in the High Court of Australia, the majority of the Judges (*Gavan Duffy* and *Rich* JJ.) held that no such intention could be inferred, while the judgments of the Full Court of Western Australia and of *Barton* J. in the High Court were to the contrary effect.

To require proposals for insurance to be made in writing and to incorporate them into the policy is a change from the ordinary course of marine insurance business, which is in favour of the insurer.

(1) 19 C.L.R., 166.

Unfortunately it raises new difficulties. When the assured's statements, made in the course of negotiations, are negotiations only and are made by word of mouth, they affect the insurance itself only when they are proved by evidence, and are also shown to misrepresent facts material to the risk and material to be known by a prudent underwriter in deciding whether or not to take the risk, and, if so, at what premium. It is for a jury to find on evidence what was said, and whether it was material. When the applicant for insurance has to subscribe his statements in writing, and then they are made a part, and that a promissory part, of the policy itself, the whole matter is changed. There is now no such question of fact for a jury; these are questions of construction for the Court. There stand the statements in writing; they now form the basis and are part of the contract of insurance. The question is what they mean and what is their legal effect? The construction of the assured's statements in their new setting is no easy matter. The "proposal," or part of it, originally was the applicant's own statement to the underwriter; now, though without any change in its language, it becomes as to some of its contents part of the underwriter's promise to the assured, and as to other of its contents part of the assured's promise to the underwriter. In construing this composite instrument the Court has to begin by redistributing the contents of the proposal according to their proper places in the form of the policy. Further difficulties arise from the fact that the proposal is in a printed form, prepared by the Insurance Company for general use in a host of transactions, and, though signed by the applicant, is often filled up on his behalf by someone, who for general purposes is the Insurance Company's agent and pays little more attention to the language he employs than does the assured himself. Thus intentions, which as a matter of fact were originally obscure, have to be ascertained by construing language also obscure, and, to add to the difficulty, whatever the language meant when the assured put his hand to it in the proposal, it must be construed by the Court as part of the policy, a highly technical instrument, which as likely as not the assured never saw.

The appellants use a proposal form, which is printed in at least

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ten different founts of type. This no doubt diversifies its appearance, but for purposes of construction founts of type have no legal meaning. It deals with seven matters. It begins with a request to insure "the undermentioned interest" upon a certain voyage. For the particulars of the interest six columns are provided, each with a printed heading. These columns are enclosed by a pair of parallel lines at top and bottom ruled across the sheet. The respondent relied upon the lower pair of these lines as showing that what was above them was a description of interest insured and only what was below them could be in the nature of a warranty. Unfortunately, these lines are mere typography. They complete the framework to be filled in and are of no significance in the construction of the document. It must be confessed that this framework was of singularly little use in the present case, for the words in question are written across five of the six columns provided, though at most they only belong to the first two, viz., those headed "Colour, Brands or Marks, &c.," and "Description of animals," and, even so, they are not distributed between these two columns in any way, but run irregularly as follows: "Bay Gelding by Soult and St. Paul mare 5 yrs UЧY nr sh, 2 hind legs white, blaze on face, slight chip off knee Grey hairs nr side belly." The reader must sort out these statements for himself. One of the columns is headed "Warranty," but this is a misnomer. It is really the space in which the applicant states which of two sets of terms, printed at the foot, he means to apply for—"all risks" or "F.P.A." Below these blanks and the lower pair of parallel lines the print states a warranty, which the appellants require in all cases, and then come four questions for the applicant to answer; three ask him as to matters of fact within his knowledge, and the fourth asks at which of the appellants' branch offices he wishes a claim to be payable. After another printed term about proof of death, of minor importance, come next a declaration to be signed by the applicant and a statement of the rate and amount of premium. The declaration is as follows: "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 Limited subject to the conditions of the policy of the Company."

Even as a proposal this form leaves much to be desired. When it comes to be transplanted into the policy it sets puzzles alike to the clerk, who fills up the policy, and to the Judges, who interpret it. Still their Lordships cannot accept the respondent's argument that the result is an ambiguous document, which ought to be read *contra proferentes*. Opinions may differ, and have differed, as to the right reading, but when one meaning or the other is chosen, the rest is clear. As it happens, the person who filled up the policy described the horse in terms of the proposal form, omitting the words "by Soult and St. Paul mare, 5 yrs.," and the form of the policy differs materially from the words of the "all risks" clause, as stated in the proposal form, but these vagaries are cured, though not excused, by the words in the policy "which proposal or statement the insured hath agreed shall be the basis of this policy, and be considered as incorporated herein," and by the words in the "all risks" clause in the proposal form "subject to the terms and conditions of the Company's policy."

Primâ facie, all the words which the policy contains (except parts of the general form inapplicable to the particular transaction) are words of contract, to which effect must be given. *Primâ facie*, words qualifying the subject matter of the insurance will be words of warranty, which in a policy of marine insurance operate as conditions. The words "by Soult and St. Paul mare, 5 years," though not inscribed on the face of the policy, are there none the less by incorporation, and by the same incorporation the assured "warrants and declares" their truth, unless, indeed, they are outside "all the above statements" in the declaration which he signed. The respondent says (1) that "all the above statements" means "all the above statements below the lower pair of parallel lines ruled across the form," and one reason given is that the printed words "subject to the following warranty," which occur at that point, import that what succeeds them may be words of warranty, but that what precedes them is not. Their Lordships can only say that they cannot so restrict "the above statements," which, in their opinion extend at least to every statement of existing fact

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purporting to come from the applicant, and standing on the proposal paper anywhere above the declaration.

The respondent next says (2) that the words in question cannot be material but should be disregarded, for the policy is an open one, and, therefore, in case of loss only the animal's actual value, not exceeding £425, is payable, be his pedigree what it may. He says that the words in question have no more to do with the insurance than " has carried a lady," or " would suit an elderly gentleman," and are really only appropriate to a seller's advertisement, and not to a policy of marine insurance. Their Lordships appreciate the weight of this argument, which prevailed with the majority of the Judges in the High Court, but they cannot accept it. The Act itself provides that, where the words used express an intention to warrant, they have effect as a condition, which must be exactly complied with, whether material to the risk or not. It is for the purpose of negativing such an intention that the alleged immateriality is relied on, and it is said that words not " bearing upon the risk," to use Lord Blackburn's phrase (*Thomson* v. *Weems* (1)), cannot have been meant as a warranty but should be passed by in construing the policy. How far any words which the parties have introduced should be disregarded by a Court in construing the contract, unless they are plainly repugnant or insensible, is a matter which need not be further discussed, because, in their Lordships' view, the words in question are capable of materially affecting the transaction. They do " bear upon the risk." Regard must be had, no doubt, to the surrounding circumstances, in order that the policy may be read as the parties to it intended it to be read (*Union Insurance Society of Canton Ltd.* v. *George Wills & Co.* (2)); but this means having regard to the nature of the transaction and the known course of business and the forms in which such matters are carried out, and not to particular facts proved to have occurred at the inception of the transaction or during the negotiations, such as were detailed in the evidence at the trial. If the words in question were left out, there would be nothing to show what kind of horse the animal insured was. It might be anything from a Shetland pony to a Suffolk punch; it

(1) 9 App. Cas., 671, at p. 684. (2) (1916) 1 A.C., 281, at pp. 286, 288.

might be thoroughbred or crossbred; it might be any manner of bay gelding, branded as described, which happened to have the white patches and grey hairs in question, and had been let down and chipped its off knee. It was insured against "all risks," including the risk of being slung overboard, and, whilst on board, against all sea risks, including mortality. Their Lordships cannot say that such risks may not be capable of being affected by the circumstances expressed in the words which the respondent seeks to deprive of significance. The courage, the docility, the endurance of the horse and the consequent likelihood of its making the voyage and being landed safely, may, for all their Lordships know, be affected one way or the other by the pedigree in question; and in any case since the parties have imported this statement into their contract, presumably they thought it material. Again, the words may be material if, in case of loss, the identity of the animal came to be disputed, or if, the vessel being overdue, the underwriters desired to reinsure their line on the horse. Their Lordships are therefore of opinion that effect must be given to the words in question by holding that the assured warranted their truth, in accordance with the intention expressed in the form of words employed, and, as the words turn out to have been unfounded in fact, the policy is avoided, and the appeal must be allowed.

The policy further contained a "held covered" clause, and the respondent claimed the benefit of it. This point had neither been pleaded nor argued below, and it must not be assumed that, consistently with settled practice, their Lordships could have entertained it, but the appellants by their counsel undertook "to discuss the matter with the respondent and, if necessary, to have the rights decided by litigation." The proper order will, therefore, be, that the appeal be allowed and the judgment in favour of the plaintiff be set aside, and that the respondent have liberty to amend the pleadings so as to raise the question, as a further issue in the action, whether he is entitled to be held covered, and if so on what terms, notwithstanding that the warranty of the horse's pedigree has not been fulfilled, and to proceed to trial of that issue with all despatch, and at the trial to give further evidence, if so advised, but not so as to contradict or vary the facts already found, but that unless he

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amends within six months and so proceeds thereafter, final judgment in the action be entered for the appellants. In accordance with the order giving special leave to appeal, dated 23rd March 1915, the appellants will pay the costs of this appeal as between solicitor and client. Their Lordships will humbly advise His Majesty to the above effect.

Foll/Appl *Cornell v Deputy Commissioner of Taxation (SA)* (1920) 29 CLR 39

[PRIVY COUNCIL.]

THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (AT THE RELATION OF GOLDSBROUGH, MORT & COMPANY LIMITED) AND ANOTHER . . . } PETITIONERS;

AND

THE ATTORNEY-GENERAL FOR THE COMMONWEALTH AND ANOTHER . . } RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL.* 1916. June 2.

Land Tax—Power of taxation—Subject of taxation—Leasehold estates in Crown lands—Validity of Statutes—Repugnancy to Imperial Statutes—Tax upon State property—Tax upon State instrumentality—Statute dealing with more than one subject of taxation—Taxation of shareholders of companies—Declaratory order—Basis for determining unimproved value of leases of Crown lands—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (II.), (XXXIX.), 55, 107, 114—*Land Tax Assessment Act* 1910-1914 (*No.* 22 *of* 1910—*No.* 29 *of* 1914), *secs.* 11, 27, 28, 29, 36, 39, 40, 48, 56—*Colonial Laws Validity Act* 1865 (28 & 29 *Vict. c.* 63), *sec.* 2—*New South Wales Constitution Act* 1855 (18 & 19 *Vict. c.* 54), *secs.* I., II.; *Sched.* 1, *secs.* 1, 43, 58.

* Present—Lord Buckmaster L.C., Earl Loreburn, Viscount Haldane, Lord Sumner and Lord Parmoor.