[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LIMITED . . . . . DEFENDANT, } APPELLANT;

AND

THE PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE COMPANY OF AUSTRALIA LIMITED . . . . . PLAINTIFF, } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1932.

SYDNEY, *April* 15, 19-21; *Aug.* 11.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Life Assurance—Reassurance—Contract, how constituted—Proposal and statements in original assurance "basis of the contract"—Statement by original assured untrue—Settlement of claim by reassured—"Settlement" clause in policy of reassurance—Whether settlement binding on reassurer—Materiality of misrepresentation and omissions.

The respondent issued a policy of assurance on the life of C. for the sum of £2,000 which recited that it was made in consideration of an application, statements and declaration "which together with the conditions indorsed hereon are hereby made part of the contract." One of the statements referred to was a "personal statement" by C. in which, to a question "Have you required medical advice within the last five years?" he replied "Once," and gave particulars of the one occasion. The respondent then made a proposal for reassurance with L., another assurance company. The proposal, after reciting the desire of the respondent to effect a reassurance "in accordance with this proposal and the stipulations in the policy to be issued in pursuance hereof," declared and agreed "that this proposal and declaration together with the attached copies and particulars as to health . . . of the life proposed shall be the basis of the contract . . . and that if any untrue statements shall have been made or any material information withheld the contract shall

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

be void." The proposal for assurance and the personal statement by C. were attached. L. then issued a reassurance policy which recited that the respondent had made a proposal and a statement, "and has also lodged with the company copies of the personal statement and medical report relating to the relative original assurance, and this proposal has been accepted by the directors." There was no express incorporation of any of these documents in the policy. The operative clause was a promise to pay the sum of £1,000 subject to certain stipulations, and provided, *inter alia*, that "if any material information shall have been withheld or omitted from the proposal and statement above mentioned, or from the documents therein referred to, or if any material misrepresentation shall have been made in the said proposal and statement or other documents, then this policy shall be null and void." The policy bore the following indorsement: "It is hereby understood and agreed that the within written policy is a reassurance of portion of the amount assured under the same life in the" respondent "company whose settlement in the event of a claim shall be binding on the" L. "company up to an amount being a proportion of the claim or claims paid in connection with the same life." After C.'s death, which occurred whilst both policies were in operation, it was established that the answer given by him in his personal statement as above was incorrect, he having, in fact, sought and obtained medical advice on not less than four occasions during the period in question. The respondent paid a claim under the policy of assurance and thereupon claimed to be reimbursed by the appellant, to which company the rights and obligations of L. in the transaction had been transferred by a novation. Although it did not dispute the bona fides of the respondent's payment, the appellant declined to pay on the ground that C.'s personal statement was part of the basis of the contract, and that the untruth and omissions were in respect of material matters.

Held as follows:—

(1) By *Rich*, *Starke*, *Dixon* and *McTiernan* JJ. (*Evatt* J. dissenting), that the contract of reassurance was contained in the policy alone, and did not consist of the policy plus the proposal and the documents attached thereto.

(2) By the whole Court, that the declaration in the proposal for reassurance did not constitute an agreement collateral with the policy.

(3) By the whole Court, that the indorsement on the policy of reassurance did not override the other stipulations in the policy.

(4) By *Rich*, *Starke*, *Dixon* and *McTiernan* JJ., that the respondent's right to recover depended upon the question of fact whether the answer in the personal statement amounted to a material misrepresentation and to the withholding or omitting of material information, which had not been determined.

Australian Widows' Fund Life Assurance Society Ltd. v. *National Mutual Life Association of Australasia Ltd.*, (1914) A.C. 634, applied.

Decision of the Supreme Court of New South Wales (Full Court): *Producers and Citizens Co-operative Assurance Co. of Australia Ltd.* v. *Australian Provincial Assurance Association Ltd.*, (1931) 31 S.R. (N.S.W.) 544, reversed.

APPEAL from the Supreme Court of New South Wales.

On 19th May 1926 Katie Madoline Lucy Coventry of Camperdown, Armidale, New South Wales, assured the life of her husband, Andrew Oban Coventry, a grazier, aged sixty-three years, with the Producers and Citizens Co-operative Assurance Co. of Australia Ltd. in the sum of £2,000 payable to her immediately on satisfactory proof of his death. In a "personal statement" made on 22nd May to the medical officer of the Company, by the husband, he answered, in reply to the question "Have you required any medical advice within the last five years?" that once, two or three years previously, he had visited Dr. Blackburn at Macquarie Street, Sydney, for the purpose of an overhaul, and had been given a bottle of medicine. The eighth question was: "Are there any other circumstances connected with your health, habits, occupation, or otherwise, which ought to be communicated in order to enable the directors to judge fairly of the risk of assuring your life? If there be such, please to state them, as concealment of material fact is fatal to the validity of the policy." This question he answered in the negative. Then he made a declaration that all the statements made by him were true. On 14th June, the premium having been paid, the Company issued to Mrs. Coventry a policy of assurance expressed to be in consideration of the application for the policy and the statements and declaration connected therewith, "which together with the conditions indorsed hereon are hereby made part of the contract." Some days prior to such issue, however, the Company, on one of its own forms, made a proposal for reassurance in respect of Coventry's life to the Life Insurance Co. of Australia Ltd., the sum to be reassured being £1,000. After setting out certain relevant particulars the proposal proceeded:—"Copies of particulars as to health, habits and age of the life proposed (contained in the original proposal . . . to the Producers and Citizens Co-operative Assurance Company of Australia Limited and other documents connected therewith) are forwarded herewith. Declaration.—Being desirous of effecting a reassurance with the Life Insurance Company of Australia Limited on the above-named life for the benefit of the Producers and Citizens Co-operative Assurance Company of Australia Limited in accordance with this proposal and the stipulations in

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

the policy to be issued in pursuance hereof, I declare and agree that this proposal and declaration, together with the attached copies and particulars as to health, habits and age of the life proposed shall be the basis of the contract between Life Insurance Company of Australia Limited and the Producers and Citizens Co-operative Assurance Company of Australia Limited, and that if any untrue statements shall have been made or any material information withheld, the contract shall be void and all moneys paid on account thereof shall be forfeited. Signed at Sydney this fourth day of June 1926. Signature for the Producers and Citizens Co-operative Assurance Company of Australia Limited—P. H. Morton."

The policy of reassurance, which was issued by the Life Insurance Co. of Australia Ltd. on one of its own forms, recited :—" Whereas the Producers and Citizens Co-operative Assurance Company of Australia Limited . . . (hereinafter called the assured) has made a proposal and statement dated the fourth day of June 1926, to the Life Insurance Company of Australia Limited (hereinafter called the Company) for a reassurance on the life of Andrew Oban Coventry grazier (hereinafter called the person assured) and has also lodged with the Company copies of the personal statement and medical report relating to the relative original assurance, and the proposal has been accepted by the directors And whereas the said assured has paid the sum of £93 10s. as the premium on the policy up to and inclusive of the thirty-first day of May 1927 and has agreed to pay a further sum of £93 10s. on the first day of June of each succeeding year until the death of the within person assured." The policy witnessed that " the Company " would, subject to payment of premiums as and when due, and satisfactory evidence of the death, age and identity of " the person assured," and upon production of the policy, " pay to the assured or its assigns the sum of £1,000. . . . Provided that if any material information shall have been withheld or omitted from the proposal and statement above mentioned, or from the documents therein referred to, or if any material misrepresentation shall have been made in the said proposal and statement or other documents, then this policy shall be null and void and all premiums paid thereon shall be forfeited to the Company." On the back of the policy, after a notation that

it was for all purposes deemed to be dated 1st June 1926, appeared the following indorsement:—"It is hereby understood and agreed that the within written policy is a reassurance of portion of the amount assured under the same life in the Producers and Citizens Co-operative Assurance Company of Australia Limited, whose settlement in the event of a claim shall be binding on the Life Insurance Company of Australia Limited up to an amount being a proportion of the claim or claims paid in connection with the same life by the Producers and Citizens Co-operative Assurance Company of Australia Limited not exceeding the face values of this and any other reassurance policy in connection with the same life issued by the Life Insurance Company of Australia Limited to the Producers and Citizens Co-operative Assurance Company of Australia Limited and in force at the date of the claim, the said proportion being the ratio of the total sums assured under the policies issued as reassurances upon the same life by the Life Insurance Company of Australia Limited to the Producers and Citizens Co-operative Assurance Company of Australia Limited which shall be in force at the date of claim to the total sums assured under the one or different policies on the same life in force at the date of claim in the Producers and Citizens Co-operative Assurance Company of Australia Limited. —G. Richard Sewell, pro Secretary.—Sydney, 15th June 1926."

It was admitted that, by novation, the rights and obligations of the Life Assurance Co. of Australia Ltd. in respect of the transaction were duly taken over by the Australian Provincial Assurance Association Ltd.

Andrew Oban Coventry died while the assurance and reassurance were in operation. Evidence then became available that his answers to the questions contained in the personal statement, as shown above, were untrue; and that, on the contrary, he had, on 6th April 1923 and 24th May 1925 visited Dr. Blackburn for the purpose of obtaining medical advice, which advice he, to some extent at least, did not act upon, and also, for the same purpose, he had visited Dr. Bryden, then practising at Armidale, on 7th June 1922 and 20th August 1924.

Notwithstanding this evidence, a claim for £2,000 made by the widow under her policy was settled by the Producers and Citizens

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

Co-operative Assurance Co. of Australia Ltd., but, although it did not dispute the bona fides of the settlement, the Australian Provincial Assurance Association Ltd. declined to pay to the former Company the proportion of the risk it had reassured, on the ground that the incorrectness of the answer given by Coventry and the non-disclosure by him of material information discharged it from liability under the contract of reassurance.

An action was then brought in the Supreme Court upon the policy of reassurance, the plaintiff, the Producers and Citizens Co-operative Assurance Co. of Australia Ltd., contending that the policy did not incorporate the personal statement made by Coventry, and that the defendant could not rely upon any untruthful statement unless it amounted to a material misrepresentation within the meaning of the express proviso contained in the policy.

At the trial, before *James* J., that learned Judge ruled against the plaintiff Company's contention, and directed the jury to return a verdict for the defendant on the ground that the " personal statement " containing the untrue answers was part of the basis upon which the policy was issued and so must be construed as part of the contract.

An appeal by the plaintiff to the Full Court of the Supreme Court was, by a majority, allowed, the verdict set aside, and a verdict in the sum of £1,000 entered for the plaintiff: *Producers and Citizens Co-operative Assurance Co. of Australia Ltd.* v. *Australian Provincial Assurance Association Ltd.* (1).

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

Other material facts appear in the judgments hereunder.

E. M. Mitchell K.C. (with him *Gain*), for the appellant. The erroneous answer made by the deceased formed part of the basis of the original contract of assurance, and it is a part also of the basis of the reassurance contract between the appellant and the respondent. This being so, the settlement clause has no operation. There is only one contract between the parties, that is, the contract

(1) (1931) 31 S.R. (N.S.W.) 544.

of reassurance which consists of the proposal, including the attached documents, plus the policy. Prior to the execution of the policy there had been a proposal, an acceptance, and a payment of the premium; therefore, there was, prior to such execution, an existing contract of reassurance agreed upon by the parties to consist of the terms in the proposal and the policy in the form issued by the appellant (*Adie & Sons* v. *Insurances Corporation Ltd.* (1)). The truth of the answers made by the deceased was a basic condition of the contract of reassurance, and as the condition appears in writing in the contract it must be regarded as dominant.

[DIXON J. referred to *Fowkes* v. *Manchester and London Life Assurance and Loan Association* (2).]

As the answers were in fact untrue the whole contract became void (*Australian Widows' Fund Life Assurance Society Ltd.* v. *National Mutual Life Association of Australasia Ltd.* (3)). Even though there be no reference to the proposal, the Court will regard it as being basic to the contract if the parties definitely agreed that it should be so (*Joel* v. *Law Union and Crown Insurance Co.* (4)). Effect must be given to whatever the parties have agreed upon (*Wood* v. *Dwarris* (5)).

[STARKE J. referred to *Collett* v. *Morrison* (6).]

The contract between the parties consists of all the documents taken together, either as collateral, or as main contract and subsidiary contract (*Baily* v. *British Equitable Assurance Co.* (7); *Hoyt's Pty. Ltd.* v. *Spencer* (8)).

[STARKE J. If not incorporated, would not the proposal have to be rectified in accordance with the contract? (See *In re Bradley and Essex and Suffolk Accident Indemnity Society* (9).)]

No. That case is distinguishable because there there was merely a proposal but here, in addition to the proposal, there is a stipulation that the contract of reassurance was to consist of the policy plus the proposal. When it forms part of the contract the proposal overrides the policy in the event of inconsistencies arising. Where

(1) (1898) 14 T.L.R. 544.
(2) (1863) 3 B. & S. 917; 122 E.R. 343.
(3) (1912) 14 C.L.R. 141, at pp. 170 *et seqq.*
(4) (1908) 2 K.B. 431, 863.
(5) (1856) 11 Ex. 493; 156 E.R. 925.
(6) (1851) 9 Hare 162; 68 E.R. 458.
(7) (1904) 1 Ch 374; (1906) A.C. 35.
(8) (1919) 27 C.L.R.133.
(9) (1912) 1 K.B. 415, at pp 430, 431.

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

a contract consists of two or more documents they should be construed together (*Jacobs* v. *Batavia and General Plantations Trust Ltd.* (1)). Even though a policy does not expressly incorporate a proposal the preliminary documents must be taken as forming part of the contract (*Joel* v. *Law Union and Crown Insurance Co.* (2); see also *Australian Widows' Fund Life Assurance Society Ltd.* v. *National Mutual Life Association of Australasia Ltd.* (3)). The case of *Wheelton* v. *Hardisty* (4) is not applicable because there it was nowhere suggested that the particular answer under consideration should be the basis of the contract. The question before the Court in *Griffiths* v. *Fleming* (5) was not as to whether a statement in the proposal was to be the basis of the contract, but whether the husband had an insurable interest in the life of his wife. Both *Canning* v. *Farquhar* (6) and *Roberts* v. *Security Co.* (7) are distinguishable, as in neither case was there a concluded contract prior to the issue of the policy, whilst here the contract was concluded and the premium paid prior to such issue. *Leggott* v. *Barrett* (8), referred to by the Court below, turns on a question of merger of a simple contract with a contract under seal, and in no way assists this Court. Statements which are made basic to the contract cannot be cut down by other statements (*Condogianis* v. *Guardian Assurance Co.* (9)).

[STARKE J. referred to *Maye* v. *Colonial Mutual Life Assurance Society Ltd.* (10).]

As it was expressly agreed by the parties to the first contract that statements as to the health, habits and age of the deceased were to be the basis of the contract, such statements became contractually material within the words of Lord *Dunedin* in *Dawsons Ltd.* v. *Bonnin* (11), and, therefore, the matter was not one for a jury to determine. The proviso in the contract of reassurance was intended to, and does, make material everything in all the relevant documents. In *Australian Widows' Fund Life Assurance Society*

(1) (1924) 1 Ch. 287; (1924) 2 Ch. 329.
(2) (1908) 2 K.B., at p. 437, per Lord *Alverstone* C.J.
(3) (1914) A.C. 634; 17 C.L.R. 657.
(4) (1857) 8 E. & B. 232; 120 E.R. 86.
(5) (1909) 1 K.B. 805.
(6) (1886) 16 Q.B.D. 727.
(7) (1897) 1 Q.B. 111.
(8) (1880) 15 Ch. D. 306.
(9) (1921) 2 A.C. 125; 29 C.L.R. 341.
(10) (1924) 35 C.L.R. 14, at p. 22.
(11) (1922) 2 A.C. 413, at p. 435.

Ltd. v. *National Mutual Life Association of Australasia Ltd.* (1) the Privy Council adopted the reasoning of *Isaacs* J. in that case (2) that if the basic provision failed no liability arose notwithstanding that it was sought to give the settlement clause an overriding effect. A settlement clause as indorsed on the policy of reassurance was dealt with in *National Fire and Marine Insurance Co. of New Zealand* v. *Australian Mercantile Union Insurance Co.* (3), and *Firemen's Fund Insurance Co.* v. *Western Australian Insurance Co. and Atlantic Insurance Co.* (4). Notwithstanding the settlement clause the reassurer is entitled to require to be satisfied in respect of certain matters (*Western Assurance Co. of Toronto* v. *Poole* (5)).

[STARKE J. referred to *Heilbut, Symons & Co.* v. *Buckleton* (6).

[DIXON J. referred to *Maye* v. *Colonial Mutual Life Assurance Society Ltd.* (7) and *Saunders* v. *Queensland Insurance Co.* (8), as to the meaning of the word "true."]

Windeyer K.C. and *Watt* K.C. (with them *Lloyd*), for the respondent. The deceased, who made the inaccurate statement, was not one of the contracting parties. The declaration in the proposal for reassurance does not form part of such proposal; they are separately referred to throughout and only the proposal was accepted. From the nature of the questions asked of the deceased it is obvious that strict accuracy in the answers thereto was not intended to be material to the contract. There is no incorporated warranty by the proponent as to the truth of her husband's answers. There is no clear and express intention on the part of the respondent to warrant the statement made to the doctor by the proponent. The appellant is bound by the settlement of the claim effected by the respondent in good faith, the clause as to settlement being an overriding one. The word "settlement" means "to come to a final agreement," and does not permit of adjustments as between the appellant and the respondent (*Australian Widows' Fund Life Assurance Society Ltd.* v. *National Mutual Life Association of Australasia Ltd.* (9);

(1) (1914) A.C., at p. 642; 17 C.L.R., at p. 663.
(2) (1912) 14 C.L.R., at pp. 168 *et seqq.*
(3) (1887) 6 N.Z.L.R. 144, at p. 150.
(4) (1928) 138 L.T. 108.
(5) (1903) 1 K.B. 376, at p. 386.
(6) (1913) A.C. 30.
(7) (1924) 35 C.L.R. 14.
(8) (1931) 45 C.L.R. 557.
(9) (1912) 14 C.L.R., at p. 155, per *Griffith* C.J.

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

Beauchamp v. *Faber* (1); *Western Assurance Co. of Toronto* v. *Poole* (2)). All preliminary negotiations and documents, including the proposal, merge into the policy, which is the real contract between the parties (*Australian Widows' Fund Life Assurance Society Ltd.* v. *National Mutual Life Association of Australasia Ltd.* (3); *Canning* v. *Farquhar* (4); *Roberts* v. *Security Co.* (5)). Neither the proposal nor its terms have been incorporated in the policy (*Australian Widows' Fund Case* (6)). The words "together with the attached copies" in the declaration on the proposal for reassurance should be read "accompanied by statements in the copies." The language and nature of the questions asked of the deceased by the respondent show that they were merely to satisfy the medical officer, and that the Company was not insisting on the absolute truth. The declaration that the truth of the answers so made was to be the basis of the contract must be qualified by reference to materiality. The deceased was required to disclose only what in his opinion was material; in such circumstances the respondent cannot be taken to have warranted the full disclosure of material matters, or the truth of such answers as were in fact made, but only that such information as had been supplied to it had in turn been supplied to the appellant. The answers do not amount to warranties, but are representations which avoid the contract, only if untrue and material (*Dawsons Ltd.* v. *Bonnin* (7)). The policy before the Court differs from the usual form of policy in that it does not expressly provide that the preliminary documents shall be the basis of the contract (*Wheelton* v. *Hardisty* (8); *Halsbury's Laws of England*, vol. XVII., pp. 550, 551). A statement in a proposal, including a declaration indorsed thereon, does not form part of the policy, that is, the contract, unless it is expressly incorporated therein (*Wheelton* v. *Hardisty* (9); *Fowkes* v. *Manchester and London Life Assurance and Loan Association* (10); *Maye* v. *Colonial Mutual Life Assurance Society Ltd.* (11)).

(1) (1898) 3 Com. Cas. 308.
(2) (1903) 1 K.B., at p. 386.
(3) (1914) A.C. 634; 17 C.L.R. 657.
(4) (1886) 16 Q.B.D. 727.
(5) (1897) 1 Q.B. 111.
(6) (1914) A.C., at pp. 640, 641; 17 C.L.R., at pp. 661, 662.
(7) (1922) 2 A.C. 413.
(8) (1857) 8 E. & B., at p. 247; 120 E.R., at p. 93.
(9) (1857) 8 E. & B. 232; 120 E.R. 86.
(10) (1863) 3 B. & S. 917; 122 E.R. 343.
(11) (1924) 35 C.L.R. 14.

[*E. M. Mitchell* K.C. There is no "basis" clause either in the proposal or in the contract.]

The case of *Wood* v. *Dwarris* (1) is distinguishable, as that case was decided upon an equitable ground which cannot be availed of here. The policy of reassurance was drawn by the appellant and, therefore, it is estopped from asking that such document be rectified.

[EVATT J. In *Wood* v. *Dwarris* (1) the prospectus was part of the contract.

[*E. M. Mitchell* K.C. It was on that ground that Lord *Alverstone* C.J. adopted that case for the purpose of *Joel* v. *Law Union and Crown Insurance Co.* (2).

[STARKE J. referred to *Bullen and Leake's Precedents of Pleadings*, 3rd ed. (1868), p. 569.

[EVATT J. referred to *Board of Fire Commissioners of New South Wales* v. *Dunlop* (3).]

Here a difficulty would be to determine what equity could be relied upon—which agreement was correct—which was the right period to ask for rectification. The agreement which is indorsed on the policy is *dehors* the contract although part of the subject matter, and amounts to an independent contract of reassurance in the true sense of the word (*Home Insurance Co. of New York* v. *Victoria-Montreal Fire Insurance Co.* (4)), or, alternatively, the agreement should be construed as if it contained the words "notwithstanding anything in the within-mentioned policy."

E. M. Mitchell K.C., in reply. The Court is entitled to examine all the various transactions between the parties in order to ascertain what was intended to constitute the agreement between them. Here the policy was the completing document of a contract already in existence. A recital in a policy that a proposal has been accepted is sufficient to make the proposal a part of the policy (*British Equitable Assurance Co.* v. *Baily* (5)). It is obvious, from the language used, and the fact that it appears before the signatures to the document, that the declaration forms part of the proposal for

(1) (1856) 11 Ex. 493; 156 E.R. 925.
(2) (1908) 2 K.B. 431.
(3) (1930) 31 S.R. (N.S.W.) 253.
(4) (1907) A.C. 59, at pp. 63, 64.
(5) (1906) A.C. 35.

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

reassurance. Such a declaration is a usual feature of proposals of this nature (*Saunders* v. *Queensland Insurance Co.* (1); *Maye* v. *Colonial Mutual Life Assurance Society Ltd.* (2)). The words "together with" in such declaration mean "and." *Fowkes* v. *Manchester and London Life Assurance and Loan Association* (3) is distinguishable because in that case the basic clause did not make accuracy a test of materiality. The case of *Home Insurance Co. of New York* v. *Victoria-Montreal Fire Insurance Co.* (4) is not applicable because in that case there was no indorsement on the policy and forming part of the policy as here, but a reassurance slip which was complete in itself.

Cur. adv. vult.

Aug. 11.

The following written judgments were delivered :—

RICH J. I agree with the judgment of my brother *Dixon* and think the appeal should be allowed, the judgment of the Full Court set aside and a new trial ordered.

STARKE J. In 1926 Katie Madoline Lucy Coventry insured the life of her husband, Andrew Oban Coventry, with the respondent to this appeal in the sum of £2,000, payable on the death of her husband. The respondent, in 1926, reinsured Coventry's life with the Life Insurance Co. of Australia Ltd. for £1,000, but the contract of reassurance is—as was the case in *Australian Widows' Fund Life Assurance Society Ltd.* v. *National Mutual Life Association of Australasia Ltd.* (5)—an independent contract of insurance rather than a contract of indemnity. Coventry died whilst both assurances were on foot, and the respondent Company settled with Mrs. Coventry under the policy which it had issued to her. The policy is expressed to be in consideration of the application therefor and the statements and declaration connected therewith, and which with the conditions indorsed thereon are made part of the contract. In the proposal made by Mrs. Coventry concerning her husband—the person upon whose life the policy was desired—the following

(1) (1931) 45 C.L.R., at p. 565.
(2) (1924) 35 C.L.R. 14.
(3) (1863) 3 B. & S. 917; 122 E.R. 343.
(4) (1907) A.C. 59.
(5) (1914) A.C. 634; 17 C.L.R. 657.

appears:—"Q. Have you suffered from any illness during the last five years? A. No." And in the personal statement of the husband, the following:—"Q. Have you required any medical advice within the last five years?

How long ago.	Number of Times.	Name and Address of Doctor.	Precise Cause.	Treatment given.
2 or 3 years	Once	Dr. Blackburn Macquarie st.	Went for an overhaul	Gave him a bottle of medicine."

It is now known that these statements, so far as they concern the health of the husband, were untrue, but the bona fides of the settlement made with Mrs. Coventry under this policy has not been challenged. The present action has been brought against the appellant on the policy of reassurance for £1,000. By an admitted novation, the appellant has assumed the liabilities of the Life Insurance Co. of Australia Ltd. under this policy.

The reassurance policy recites that the respondent has made a proposal and statement dated 4th June 1926 to the Life Insurance Co. of Australia Ltd. for a reinsurance of the life of Andrew Oban Coventry, and has also lodged with the Company copies of the personal statement and medical report relating to the relative original assurance, and that this proposal had been accepted by the directors, and the policy witnesseth that the Life Insurance Co. of Australia Ltd. will, subject to various conditions, pay to the respondent the sum of £1,000 upon proof of the death of Coventry. One of the conditions of this policy is: "Provided that if any material information shall have been withheld or omitted from the proposal and statement above mentioned or from the documents therein referred to, or if any material misrepresentation shall have been made in the said proposal and statement or other documents, then this policy shall be null and void and all premiums paid thereon shall be forfeited to the Company."

It is contended, however, that the policy incorporates the proposal for reassurance, and its accompanying documents, statements and declaration, as part of the basic terms of the contract, the effect of which is that if there be anything untrue in the statements or

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

Starke J.

declaration, whether to the knowledge of the insured or not, the contract is avoided (*Thomson* v. *Weems* (1)). An alternative contention is that the contract of reassurance is found in the proposal for reassurance, with its accompanying documents, statements and declaration, and the policy issued pursuant to that proposal, or else that the statements and declaration constitute an agreement collateral to the policy.

There were furnished with the proposal "copies of particulars as to the health, habits and age of the life proposed (contained in the original proposal or proposals to the Producers and Citizens Co-operative Assurance Company of Australia Limited) and other documents connected therewith." The application of Mrs. Coventry and the personal statements of herself and her husband were admittedly amongst these documents. Further, the following declaration was made on behalf of the Producers and Citizens Co-operative Assurance Co. of Australia Ltd.: "Being desirous of effecting a reassurance with the Life Insurance Company of Australia Limited on the above-named life for the benefit of the Producers and Citizens Co-operative Assurance Company of Australia Limited in accordance with this proposal and the stipulations in the policy to be issued in pursuance hereof, I declare and agree that this proposal and declaration, together with the attached copies and particulars as to health, habits and age of the life proposed shall be the basis of the contract between the Life Insurance Company of Australia Limited and the Producers and Citizens Co-operative Assurance Company of Australia Limited, and that if any untrue statements shall have been made or any material information withheld, the contract shall be void and all moneys paid on account thereof shall be forfeited." The statements made by Mrs. Coventry and her husband already referred to are in my opinion included in or covered by this declaration. But are they incorporated in the policy, as part of it? The policy does not explicitly and in the ordinary way stipulate that the proposal, statements and declaration shall form the basis and be part of the policy, but simply recites their submission to the Life Insurance Co. of Australia Ltd. and that "this proposal has been accepted." *Ferguson* J., in the Supreme Court of New South Wales, citing

(1) (1884) 9 App. Cas. 671.

Anderson v. *Fitzgerald* (1) and *Joel* v. *Law Union and Crown Insurance Co.* (2), points out that it is the duty of the insurer to establish clearly that the insured consented to the accuracy of the proposal, and of the statements in the accompanying documents, being a basic condition of the policy, and that no ambiguous language suffices for this purpose. The language used in the present case has much the same ambiguity as that used in the *Australian Widows' Fund Case* (see per Lord *Parker of Waddington* (3)), and the proviso in the policy as to material information being withheld or omitted, and material misrepresentations made adds to the ambiguity. In my opinion, the learned Judges of the Supreme Court were right, in these circumstances, in denying that the proposal and the statements in the accompanying documents were incorporated in the policy, and formed part of its basic conditions.

It is no less clear, in my judgment, that the statements and declaration do not constitute an agreement collateral to the policy. No doubt an agreement may be made contemporaneously with a written contract, and as collateral to it (*Heilbut, Symons & Co.* v. *Buckleton* (4)). But such agreements must be strictly proved, and there is nothing in the present case which suggests any contractual liability apart from and independent of the main contract.

Again, the contention cannot be sustained that the agreement of reassurance is contained in the proposal, declaration and policy, and not in the policy alone. If the parties reduce to a policy of reassurance their previous negotiations, whether they have resulted in a binding agreement or not, those negotiations are presumptively merged in the policy, which thenceforward becomes the exclusive evidence of the terms of their agreement (*Leggott* v. *Barrett* (5); *Insurance Co.* v. *Mowry* (6); *May* on *Insurance*, 4th ed. (1900), sec. 29B). The admissibility in evidence of such negotiations for the purpose of showing misrepresentation or to establish a case for the reformation of the policy or to show that the delivery was not absolute, is of course another matter.

A case for reformation of the present policy might, in view of the

(1) (1853) 4 H.L.C. 484, at p. 507; 10 E.R. 551, at p. 560.
(2) (1908) 2 K.B., at p. 886.
(3) (1914) A.C., at p. 641; 17 C.L.R., at p. 662.
(4) (1913) A.C. 30.
(5) (1880) 15 Ch. D. 306.
(6) (1877) 96 U.S. 544.

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

Starke J.

declaration attached to the proposal, have been a possibility, but such a claim could not have been entertained in an action in the common law jurisdiction of the Supreme Court of New South Wales (cf. *David Jones Ltd.* v. *Leventhal* (1)).

Another provision of the policy of reassurance is indorsed upon it. It is as follows : " It is hereby understood and agreed that the within written policy is a reassurance of portion of the amount assured under the same life in the Producers and Citizens Co-operative Assurance Company of Australia Limited, whose settlement in the event of a claim shall be binding on the Life Insurance Company of Australia Limited up to an amount being a proportion of the claim or claims paid in connection with the same life by the Producers and Citizens Co-operative Assurance Company of Australia Limited not exceeding the face values of this and any other reassurance policy in connection with the same life issued by the Life Insurance Company of Australia Limited to the Producers and Citizens Co-operative Assurance Company of Australia Limited and in force at the date of the claim, the said proportion being the ratio of the total sums assured under the policies issued as reassurances upon the same life by the Life Insurance Company of Australia Limited to the Producers and Citizens Co-operative Assurance Company of Australia Limited which shall be in force at the date of claim to the total sums assured under the one or different policies on the same life in force at the date of claim in the Producers and Citizens Co-operative Assurance Company of Australia Limited." It has been held by the Supreme Court of New South Wales that a reasonable construction of this clause is that the settlement of a claim arising under the original policy, so far at least as it involves the determination of any question which arises also under the reinsuring policy, shall be binding upon the appellant. The purpose, however, of the stipulation is to apportion claims paid on the life insured by the parties in proportion to the total risks undertaken. And for this purpose the settlement of the claim under the original policy (honesty of course being assumed) is binding upon the reinsuring Company. It cannot dispute in such a case the liability of the settling Company under its policy, or the amount of its settlement or payment. But its promise to pay is conditioned

(1) (1927) 40 C.L.R. 357.

upon many other stipulations appearing in its policy. The settlement clause does not, nor does it purport to, destroy the effectiveness of these stipulations, or by its terms make the obligation of the reinsuring Company absolute and indisputable in the case of a settlement. This view is supported by the *Australian Widows' Fund Case* (1).

The result is that the judgment below for £1,000 in favour of the plaintiff, the Producers and Citizens Co-operative Assurance Co. of Australia Ltd., must be set aside and the case go down again for trial of issues of fact raised by the pleadings which have been left undetermined.

DIXON J. By a novation the appellant Company undertook the liabilities of the Life Assurance Co. of Australia to the respondent Company upon certain treaties of reinsurance. The appellant in this way became the reinsurer in respect of portion of an insurance which the respondent Company had granted upon the life of one Andrew Oban Coventry to his wife. When his wife proposed the insurance upon his life Andrew Oban Coventry made a personal statement to the respondent Company, which may conveniently be called the reinsured. It contained a question: "Have you required any medical advice within the last five years?" His answer was to the effect that once, two or three years ago, he went for a general overhaul to a doctor, who gave him a bottle of medicine. Whether the absolute correctness of this answer was made a condition of the original contract of insurance is open to dispute in consequence of the use of forms of policy, proposal and statement appropriate only to insurances of an insured's own life.

Andrew Oban Coventry died while the insurance and the reinsurance were in operation. Evidence then became available that his answer was not in accordance with fact. After due consideration and in the exercise of an honest and reasonable judgment, the reinsured, notwithstanding this evidence, determined not to contest the widow's claim, which it duly settled. But the appellant, which it is convenient to call the reinsurer, declined to pay the reinsured the proportion of the risk that it had reinsured, on the ground that, in

(1) (1914) A.C. 634; 17 C.L.R. 657.

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

Dixon J.

consequence of the incorrectness of the answer given by Andrew Oban Coventry, it was discharged from liability under the contract of reinsurance. The reinsurer rested the contention that it was so discharged upon two provisions alternatively which it asserted formed part of the reinsurance. The first is contained in the proposal of the reinsured for the reinsurance, which is said to make the correctness of the statements of Andrew Oban Coventry's personal statement a basal condition, whether the statement be material or not. The second is a proviso contained in the policy of reinsurance issued by the reinsurer to the reinsured stipulating that a material misrepresentation in the statement shall render the policy void. The reinsured denies that the proposal operates to make the correctness of the statement basal to the policy and asserts that, in any case, by a typewritten indorsement on the policy of reinsurance a right or power was conferred upon the reinsured to bind the reinsurer by making a settlement of the original claim, so that thereupon the reinsurer became liable to bear a proportion of the loss notwithstanding the conditions of the policy of reinsurance.

At the trial before *James* J. that learned Judge ruled against the reinsured's contention, and under his direction the jury returned a verdict for the defendant appellant, the reinsurer. The jury's opinion was not obtained upon the question whether the personal statement of Andrew Oban Coventry contained misrepresentations which were material.

Upon appeal, the Full Court of New South Wales, by a majority, set aside this verdict and entered a verdict for the plaintiff respondent, the reinsured, for the amount of the reinsurance, £1,000. *Ferguson* and *Halse Rogers* JJ. accepted the contention that the condition expressed in the proposal was not a contractual provision affecting the contract of reinsurance, and adopted a construction of the indorsement upon the policy of reinsurance which obliged the reinsurer to pay a due proportion of any amount for which the reinsured should honestly and reasonably settle a claim under the original insurance, notwithstanding the existence of circumstances which otherwise might, under the express conditions of the policy of reinsurance, relieve the reinsurer from responsibility. *Davidson* J. dissented. He considered that the indorsed provision did not

override, but was subject to, the other conditions of the contract, and that the condition expressed in the proposal operated as a collateral contract controlling the operation of the reinsurance. In strictness, the adoption by the majority of this interpretation of the indorsement made it unnecessary to decide whether the conditions expressed in the proposal formed part of the contract of reinsurance, for, whether it did so or not, the settlement by the reinsured of the claim under the primary insurance would conclude the reinsurer. But in arriving at an opinion as to the meaning and effect of the indorsement, it is no doubt desirable to determine what provisions form part of the contract. The question whether the condition expressed in the proposal operates as a contractual provision probably would not have arisen but for the fact that the proposal was made upon a printed form used by the reinsured Company for the purpose of proposing for reinsurances, while the policy consisted of the reinsurer Company's printed form of reinsurance which, no doubt, was not drawn with such a form of proposal in contemplation. The policy which was issued by the reinsurer to the reinsured bears upon its face, as might be expected, all the appearance of being the final and exhaustive statement of the contract between the reinsurer and the reinsured. It commences with a recital that the reinsured Company has made a proposal and a statement to the reinsurer Company for a reassurance on the life of Andrew Oban Coventry, and has lodged with the reinsurer Company copies of the personal statement and medical report relating to the relative original assurance, and that this proposal has been accepted by the directors. After a second recital, which relates to the premium, the policy proceeds to witness that the reinsurer Company will (provided that the premiums have been paid, and upon proof of the death, age and identity of the person assured and production of the policy of reinsurance duly discharged) pay to the reinsured Company or to its assigns the sum of £1,000. The policy then further witnesses that, if any premium be not paid within a stated time, then, subject to a proviso relating to advances of premiums against surrender value, the policy shall be null and void. Next, three conditions are stated, the first of which avoids the policy if the person assured should within thirteen months die by his own hand. After these conditions, there is

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

DIXON J.

a provision excluding from the risk undertaken death through the use of an aeroplane, a clause entitling the reinsured Company to share in the profits of the reinsurer Company and then the following proviso: "Provided that if any material information shall have been withheld or omitted from the proposal and statement above mentioned, or from the documents therein referred to, or if any material misrepresentation shall have been made in the said proposal and statement or other documents, then this policy shall be null and void and all premiums paid thereon shall be forfeited to the Company." The policy then ends with an ordinary testimonium, and is executed under hand by two directors. There is a note signed by the secretary that the policy shall be deemed to be dated 1st June 1926, which was the date when the reinsured's risk commenced under the primary policy. The policy is indorsed with a typewritten clause—under the secretary's hand—that it is thereby understood and agreed that the within written policy is a reassurance of portion of the amount assured under the same life in the reinsured Company whose settlement in the event of a claim shall be binding on the reinsurer Company up to an amount being a proportion of the claim paid in connection with the same life by the reinsured Company not exceeding the face value of that and any other reassurance policies in connection with the same life issued by the reinsurer Company to the reinsured Company and in force at the date of the claim, the proportion being the ratio between the total sums so reassured and the total sums for which the life is insured by primary insurances of the reinsured Company.

Upon the terms of this policy no intention appears that any promises, conditions or stipulations contained in the proposal should form part of the contract of reinsurance. The proviso at the end which exposes the policy to annulment and avoidance, and the premiums to forfeiture, for non-disclosure and for misrepresentation, refers to the proposal and statement but not for any promissory or contractual provision that the document might contain. The reference to the proposal and statement is as a paper appropriate for the representation and disclosure of facts. In the first recital also the proposal and statement are referred to, but not in language which incorporates it in the policy as a document containing

contractual provisions which are to form part of the agreement which the policy records. Even if the narration " this proposal has been accepted by the directors " means that before the issue of the policy a contract was made consisting of an offer made in the proposal of the reinsured and of the acceptance thereof by the reinsurer, it would be taken to recite an antecedent contract intended to be reduced to a formal expression in the policy. But the recital does not appear to have this meaning. As Lord *Parker of Waddington* said of a similar recital in the case of the *Australian Widows' Fund Life Assurance Society Ltd.* v. *National Mutual Life Association of Australasia Ltd.* (1), " 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 reinsurance, leaving the terms on which such policy was granted to be specified in the ordinary way in the policy itself."

The policy cannot be disregarded by the reinsurer Company which issued it. Some theoretical difficulties have been raised as to the exact way in which a policy issued under hand by an insurer which has already made a binding contract with its insured, comes to be the record embodying their contract. But whether it be regarded as a substituted contract or as a record of the existing contract which the parties cannot disown, there can be no doubt that when, as in this case, the insured adopts the instrument and relies upon it, it becomes the principal statement of the contract between them and, if the intention appears that it should express the whole contract, then, like any other instrument to which the parties commit the expression of their agreement, at law it becomes exclusive. Of course if there is any equity entitling a party to relief against its terms by way of rectification, or otherwise, different considerations arise. Further, the reduction of a contract to a formal writing exclusively stating its terms does not, in point of legal principle, prevent the parties making or relying upon another contract collateral to the main contract, which, indeed, may itself be the consideration of the collateral contract. At the same time, in point of fact, the probability must be small of the parties intending to make such a

(1) (1914) A.C., at p. 641 ; 17 C.L.R., at p. 662.

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

Dixon J.

collateral contract when a formal instrument has been adopted, unless the circumstances are exceptional.

In the present case it is said in support of the appeal that the proposal contains a promise or condition which took effect as a collateral contract. The clause relied upon is headed "Declaration," and, after expressing the reinsured Company's desire of effecting on the life proposed a reassurance with the reinsurer Company in accordance with this proposal and the stipulations in the policy to be issued in pursuance of the proposal, the reinsured Company declares and agrees that the proposal and declaration together with the attached copies and (*sic*) particulars as to health, habits and age of the life proposed shall be the basis of the contract, and that, if any untrue statements shall have been made or any material information withheld, the contract shall be void and all moneys paid on account thereof shall be forfeited. A copy was attached of Andrew Oban Coventry's personal statement. If this is to be a collateral contract, the proposing Company must be understood as offering a promise that the contract to be expressed in the policy should be void in consideration of the reinsurer Company granting a policy embodying the terms and conditions upon which it undertook the liability of a reinsurer. There appears to be some incompatibility between the conception of a main contract which creates a liability to pay a money sum and defines the events and describes the conditions upon which the liability shall depend, and a collateral agreement stipulating for the avoidance of the main contract upon another condition, which, moreover, is directed to matters dealt with in the main contract. A collateral contract cannot be admitted as good in law if it is inconsistent with the main contract (*Hoyt's Pty. Ltd.* v. *Spencer* (1)). But, in any case, the proposal exhibits no intention that such a secondary or external contract should be made controlling the main contract. It is directed to the conditions of the main contract, and expresses the readiness of the proponent to submit to the inclusion in that contract of provisions making the statement referred to basal and avoiding the obligation of the contract if they should be untrue. Upon the question whether a secondary contract was intended, it is not possible to ignore the common practice of

(1) (1919) 27 C.L.R. 133.

expressing policies of insurance in such a way that statements in the proposal constitute the basis of the contract. The proposal, doubtless, was framed in anticipation of the issue of such a policy. But the reinsurer Company did not in fact include such a clause or provision in its policy of reinsurance and accordingly the offer contained in the proposal to agree to such a condition fell. It follows that the misstatements in the personal statement of Andrew Oban Coventry cannot operate to relieve the reinsurer Company of liability unless under the proviso contained in the policy itself which is expressed to require that a misrepresentation should be material in order to have that effect.

But the question remains whether the indorsement upon the policy does override the condition contained in this proviso and make the liability of the reinsurer depend only upon the settlement of the primary claim by the reinsured, if that settlement is bona fide and reasonable, as it undoubtedly was in the present case. In considering the effect of the indorsement, it must be remembered that the insurable interest of the reinsured in the life depends upon the existence of a valid primary insurance; that the liability to the original insured, both its existence and its extent, form the foundation of the reinsurance. In the absence of some stipulation to the contrary, the reinsurer might, before paying a claim under the reinsurance, assume the right to examine the question whether any liability to the original insurer existed under the primary policy in the reinsured notwithstanding that the reinsured had itself conceded the liability and settled the original insurer's claim, and the further right to challenge the amount paid in settlement of that claim. At the same time, while the non-existence of a primary liability might be fatal to the reinsurance, a liability in the reinsurer does not follow from the mere existence of the primary liability. It arises from the provisions of the contract of reinsurance, and depends entirely upon the conditions which that contract contains. In this sense the liability is independent. Upon the terms of the policy, apart from the indorsement, it arises only upon conditions, whether precedent or subsequent, which include payment of premiums, proof of death other than death within thirteen months by suicide and other than death from the use of an aeroplane, and

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

Dixon J.

the true statement and disclosure of material facts in the proposal, statement and other documents. To construe the indorsement as intending to overrule these conditions, the justification of clear words would be necessary. The case is not like that of *Home Insurance Co. of New York* v. *Victoria-Montreal Fire Insurance Co.* (1), where the printed form was inappropriate to the contract of reinsurance and incongruous with the evident intention of the parties. The printed form is carefully framed for the very purpose of reinsurance upon lives. When the indorsement is considered, it appears that a principal purpose served by it is to provide an upper limit of liability so framed as to induce the reinsured to reinsure with the reinsurer any further insurances it might grant upon the same life. In all these circumstances the natural meaning to give to the expression " whose settlement in the event of a claim shall be binding on the " reinsurer Company, is that it intends to do no more than preclude the reinsurer from challenging the liability of the reinsured under the primary insurance and the amount the reinsured pays, if the reinsured settles a claim under the primary insurance. The provision means to require the assumption that a primary liability existed in the amount for which the reinsured settles with the original insured, but it neither expresses nor implies that the reinsurance of that liability is a subsisting obligation. Whether or not it is a subsisting obligation depends upon the conditions on which the efficacy of the reinsurance turns. It follows from these reasons that an issue of fact upon which the right of the respondent, the reinsured Company, to recover depended was whether the answer of Andrew Oban Coventry to the question in his personal statement whether he had required medical advice within five years amounted to a material misrepresentation or a withholding or omitting of material information. It was not contended on the hearing of this appeal that upon this issue of fact the appellant, the reinsurer Company, was as a matter of law entitled to a verdict, and therefore as the decision of the jury was not obtained there must be a new trial.

The appeal should be allowed with costs. The judgment of the Full Court should be set aside and a new trial should be ordered.

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

The costs of the appeal to the Full Court should be paid by the defendant, the appellant in this Court. The costs of the former trial should abide the event. Costs should be set off.

Evatt J. On May 19th, 1926, Katie Madoline Lucy Coventry proposed to the respondent Company an insurance for £2,000 on the life of her husband Andrew Oban Coventry. On May 22nd, 1926, A. O. Coventry made a personal statement to the respondent, and stated that he had required medical advice "once" within the last four years, when Dr. Blackburn overhauled him and "gave him a bottle of medicine."

On June 4th, 1926, before it issued any policy to Mrs. Coventry, the respondent made a proposal of reinsurance, on a written form of its own, to the Life Insurance Co. of Australia Ltd. On June 12th the first premium was paid by the respondent. On June 14th the respondent issued its policy to Mrs. Coventry. On June 15th the Life Insurance Co. of Australia issued its own form of policy to the respondent. The policy contained the following recital :—

"Whereas the Producers and Citizens Co-operative Assurance Company of Australia Limited, 114-120 Castlereagh Street, Sydney, New South Wales (hereinafter called the assured) has made a proposal and statement dated the fourth day of June, 1926, to the Life Insurance Company of Australia Limited (hereinafter called the Company) for a reassurance on the life of Andrew Oban Coventry—grazier (hereinafter called the person assured), and has also lodged with the Company copies of the personal statement and medical report relating to the relative original assurance, and this proposal has been accepted by the directors. And whereas the said assured has paid the sum of ninety-three pounds ten shillings (£93 10s.) as the premium on this policy up to and inclusive of the thirty-first day of May, 1927, and has agreed to pay a further sum of ninety-three pounds ten shillings (£93 10s.) on the first day of June of each succeeding year until the death of the within person assured."

The proposal of the respondent, dated June 4th, gave particulars of the "life," of the sum to be reassured (£1,000), of the amount of the premium and of the amount of the risk retained by the respondent (£1,000). It was stated that the risk was to date from June 1st, 1926. With the proposal were included "copies of particulars as the health, habits and age of the life proposed" contained in the original proposal of Mrs. Coventry to the respondent, together with other documents connected with the proposal. The proposal concluded as follows :—

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

Evatt J.

"Being desirous of effecting a reassurance with the Life Insurance Company of Australia Limited on the above-named life for the benefit of the Producers and Citizens Co-Operative Assurance Company of Australia Limited in accordance with this proposal and the stipulations in the policy to be issued in pursuance hereof, I declare and agree that this proposal and declaration, together with the attached copies and particulars as to health, habits and age of the life proposed shall be the basis of the contract between Life Insurance Company of Australia Limited and the Producers and Citizens Co-operative Assurance Company of Australia Limited, and that if any untrue statements shall have been made or any material information withheld, the contract shall be void and all moneys paid on account thereof shall be forfeited."

It is admitted that, by novation, the rights and obligations of the Life Insurance Co. of Australia in respect of the transaction were duly taken over by the appellant.

This appeal from the Supreme Court of New South Wales has been brought to determine whether, in the events which have happened, (I.) the appellant is under no liability to the respondent, as *James* J. and *Davidson* J. have considered; or (II.) whether, as *Ferguson* and *Rogers* JJ. held, the appellant's liability to pay the amount of reinsurance is established by a clause indorsed upon the policy; or (III.) whether the matter should be remitted to a jury in order to determine whether certain statements relating to the health of the "life" were material or not.

The first question which arises is whether the stipulation which was indorsed upon the policy entitles the respondent to judgment of £1,000, inasmuch as by payment in full the respondent duly settled Mrs. Coventry's claim under her policy. The stipulation was as follows:—

"It is hereby understood and agreed that the within written policy is a reassurance of portion of the amount assured under the same life in the Producers and Citizens Co-operative Assurance Company of Australia Limited, whose settlement in the event of a claim shall be binding on the Life Insurance Company of Australia Limited up to an amount being a proportion of the claim or claims paid in connection with the same life by the Producers and Citizens Co-operative Assurance Company of Australia Limited not exceeding the face values of this and any other reassurance policy in connection with the same life issued by the Life Insurance Company of Australia Limited to the Producers and Citizens Co-operative Company of Australia Limited and in force at the date of the claim, the said proportion being the ratio of the total sums assured under the policies issued as reassurances upon the same life by the Life Insurance Company of Australia Limited to the Producers and Citizens Co-operative Assurance Company of Australia Limited

which shall be in force at the date of claim to the total sums assured under the one or different policies on the same life in force at the date of claim in the Producers and Citizens Co-operative Assurance Company of Australia Limited."

The main part of the policy is headed "Reassurance Whole Life Assurance Policy," but what the reinsurer promised, in the policy itself, was to pay the sum of £1,000 to the respondent upon payment of the agreed premiums and upon satisfactory proof of the "death, age and identity" of A. O. Coventry. Such a promise is not indicative of reinsurance at all and there was no express provision preventing the respondent from settling a claim of £2,000 by Mrs. Coventry by payment to her of (say) £1,000, and from still recovering the full £1,000 from the reinsurer under the separate policy. But that would not have been a true sharing of the risk between the two insurers. On the other hand, there was no clause in the main body of the policy which expressly debarred the reinsuring Company from saying to the respondent:—"You paid Mrs. Coventry, but, under your policy, you were not liable to pay her anything. We merely assured your 'liability' to her, but as that liability is nothing, we shall pay you nothing."

During argument, it seemed to me reasonably clear that the indorsed stipulation addressed itself to such possibilities for the purpose of excluding them. The £1,000 promised to be paid was brought into due relation to the risk assumed by the respondent over the same life. Any settlement by the respondent with Mrs. Coventry was to "be binding on" the reinsurer, so that the latter Company could not question or bring into controversy, either the liability of the respondent to Mrs. Coventry or the precise quantum of such liability. But any such settlement by the respondent was only binding upon the reinsurer upon the footing of a definite maximum liability, fixed by working out a proportion of claims actually *paid* by the respondent in connection with the same life. The maximum amount payable by the reinsurer was to be £1,000 (the face value of the policy of reinsurance) plus the face value of any other reinsurance policy issued to the respondent by the reinsurance Company in relation to the same life, if such policies were in force at the date of claim. The fraction was to be that borne to the total risks on the same life carried by the respondent at the date of claim,

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

Evatt J.

by the then total reinsurances of the "life" by the respondent with the reinsurer.

As a result of this stipulation the following consequences would ensue. If Mrs. Coventry increased the insurance with the respondent from £2,000 to £4,000, and the reinsurance Company did not agree to take over any part of the added risk, the fraction would decrease from one-half to one-quarter. In such a case the amount payable by the reinsurance Company to the respondent would be, not £1,000, but one-fourth of the claims paid by the respondent, so that if the respondent settled for £2,000, such settlement would then be binding as such up to one fourth of £2,000, i.e., £500.

The majority of the Supreme Court held that the stipulation made the mere fact of the respondent's paying a claim under its own policy, something which entitled it to be paid a proportionate part by the reinsuring Company. But it is conceivable that the respondent might, for many good reasons, see fit to meet a claim. In such a case the reinsurer, it is said, could not rely upon the fact that (say) the death resulted from an aeroplane accident although liability in such a case was excluded by a special clause of the policy of reinsurance.

I cannot think that the indorsed condition should be so construed. On the contrary, its main purpose was to cut down the main contractual liability to pay to the respondent £1,000 in the event of A. O. Coventry's death, by having regard to the amounts actually paid on the risks by the respondent. For not only might the respondent pay in full although not liable at all to Mrs. Coventry, but it might pay nothing or very little, although liable at law to pay in full. The indorsed stipulation meant to make the legal liability of the respondent to Mrs. Coventry under its policy, irrelevant to the question of liability as between the two insurance companies. The result was to be this: if the respondent paid, its liability to pay Mrs. Coventry could not be questioned by the reinsurer. But, on the other hand, the amount paid, not the amount properly payable by the respondent, was to afford the true basis for quantifying the reinsurer's liability to the respondent.

I am of opinion that the respondent was not enabled by the stipulation to say to the reinsurer: "Although, in the events which

have happened, your policy excludes any liability on your part to pay us, we have paid on the life and that binds you to pay us your quota in any event." It follows that the respondent was not entitled to have judgment entered for it, and the Full Court's order should be set aside.

The general question of the liability of the reinsurer remains to be determined by the various provisions of the contract of reinsurance, and it is to these I now turn.

Is the respondent contractually bound by its declaration of June 4th, or is its contractual liability to the appellant determinable solely by reference to the various clauses of the policy ?

The recital has been set out in full. It shows clearly that the policy was intended, not to constitute any departure from, but to be in strict accordance with, the proposal. "This proposal," says the recital, "*has been* accepted by the directors." Payment of the proposed premium of £93 10s. had been made before the policy issued. The declaration attached to the proposal of June 4th stated that the respondent was desirous of reinsuring "in accordance with this proposal and the stipulations in the policy to be issued in pursuance hereof."

In my opinion the inference to be drawn from the documents is that both parties contemplated that the acceptance of the proposal would take the form of the issue of a policy in common form by the reinsurer, and that such issue would also be an acceptance of the undertakings contained in the proposal. Therefore, so far as the respondent is concerned, its own proposal and declaration conclusively prove its knowledge that the assurance effected would be in accordance, not only with the stipulations in the policy, but also with the proposal itself. So far as the reinsurer was concerned, the recital in its policy indicates that it was accepting the respondent's proposal, of which the declaration was a very prominent part.

The rights and obligations of the parties should therefore be ascertained by giving effect, not only to the actual stipulations of the policy, but to any additional promises contained in the declaration. The actual word "incorporated" is not used in the policy in order to introduce the provisions of the proposal into the totality of the contractual rights and duties. But "incorporated" only

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

Evatt J.

signifies that the one agreement is embodied in two or more documents. That embodiment is otherwise expressed in the present instance, but I think it is sufficiently expressed.

The declaration contains, on the part of the respondent, a declaration (*a*) that the particulars of the life proposed shall be the basis of the "contract," and (*b*) that if any untrue statements "shall have been made" the contract shall be void. The phrase "the contract" refers to the whole agreement to be evidenced by the proposal and the policy.

One view which found favour with the majority of the Supreme Court should perhaps be referred to. *Halse Rogers* J. (1) was of opinion that "the two alleged contracts cannot stand together," because the defendant Company's reliance upon the promise contained in the declaration amounts to a wider claim to be able to reject claims than that accorded by the policy. This view proceeds upon the suggestion that there were two contracts between the parties, one collateral to the other. That hypothesis was rejected by his Honor, who said: "I find it hard to believe that the parties to a commercial transaction of this sort intended their relations to be governed by more than one contract" (2).

In my opinion there were not two contracts between the parties but one only, evidenced by the two documents each of which referred to the other. The declaration in the proposal stated and assumed that both would operate concurrently. His Honor said that "the issue of that policy, seeing that it was not in the precise terms contemplated by the declaration, was really a counter offer and when such counter offer was accepted, the policy became the effective contract and what was done by way of preliminary negotiation ceased to have effect" (3).

But, as has been shown, the reinsurance was effected and intended to be effected, in pursuance of the proposal and not as departing from it, "in accordance with this proposal and the stipulations in the policy to be issued in pursuance hereof." This statement of the respondent in the proposal is to be taken not only in the light of the fact that, in the case of insurance companies, written proposals

(1) (1931) 31 S.R. (N.S.W.), at p. 563.

(2) (1931) 31 S.R. (N.S.W.), at p. 561.

(3) (1931) 31 S.R. (N.S.W.), at p. 562.

are frequently, by reference or otherwise, linked up with a policy to make the complete record of the transaction, but also in the light of the fact that, in the present transaction, each party seems to have been well acquainted with the other's particular form of policy.

On the whole, I think that my opinion finds support in the authorities.

In *Thomson* v. *Weems* (1), a case of life insurance, the assured signed a statement "that this declaration shall be the basis of the contract between me and the . . . company; and that if any untrue averment has been made . . . the assurance" shall "be absolutely null and void" (2). But the policy also recited the declaration, stating that it was "the basis of this assurance," and there was a proviso in the policy that if anything averred in the declaration was untrue the policy shall be void.

Thomson v. *Weems* (1), therefore, does not raise the same question as this case. But Lord *Blackburn* pointed out (3), in passages often cited, that it was competent for contracting parties, "if both agree to it and *sufficiently express their intention* so to agree," to make the actual existence of immaterial matters a "condition precedent to the inception of any contract." He added that in policies of marine insurance, any statement of a fact bearing upon the risk undertaken by the written policy, "by whatever words and in whatever place," was, prima facie at least, something compliance with which was a condition precedent to the attaching of the risk (4). He did not think that the rule as to construction of marine policies was also applicable to life policies, but concluded that, in the then case, the truth of the particulars was warranted, seeing "that it is expressly said in the policy, as well as in the declaration itself, that the declaration shall be the basis of the policy" (4).

Lord *Watson* (5) discussed the case of *Life Association of Scotland* v. *Foster* (6). In that case, it appeared that the proposal for assurance contained a declaration by the deceased and an undertaking by her that if any untrue statement were made therein or in the answers

(1) (1884) 9 App. Cas. 671.
(2) (1884) 9 App. Cas., at p. 680.
(3) (1884) 9 App. Cas., at p. 683.
(4) (1884) 9 App. Cas., at p. 684.
(5) (1884) 9 App. Cas., at pp. 692, 693.
(6) (1873) 11 Macph. (Ct. of Sess.) 351.

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

Evatt J.

to questions by the society's medical officer in reference to the proposal, the assurance should be void. "It is of importance to observe," said Lord *Watson*, "that the pursuers of the reduction did not plead the untruth of any statement made by the deceased in her proposal for assurance. The only statements upon which they relied as untrue, and therefore constituting a breach of warranty, were those made by the assured in reply to the questions put by their medical officer" (1).

Lord *Watson* pointed out that the conclusion of the Court in *Foster's Case* (2) was merely that Mrs. Foster's answer was not untrue. "A very different question," added Lord *Watson*, "would have arisen for decision in that case if the assured had, in the proposal which she submitted as the basis of assurance, affirmed that she was not, 'at the time,' affected with hernia" (3).

In *Dawsons Ltd.* v. *Bonnin* (4) the answer to a question asked in the proposal form was untrue, but there was no declaration by the assured in the proposal form that the statements were true or to be the basis of the contract, or that, if untrue, the contract should be void. But the policy itself recited that the proposal "shall be the basis of this contract and be held as incorporated herein." The decision of the House of Lords was that the truth of the statements in the proposal, whether material or not, was a condition of the liability of the insurer.

Lord *Dunedin* was of opinion that the statements in the proposal, having been made the "basis of the contract and incorporated therewith," were "contractually material." Dealing with the word "basis" he said: "It must mean that the parties held that these statements are fundamental—i.e., go to the root of the contract—and that consequently if the statements are untrue the contract is not binding" (5). Lord *Dunedin* also said that no direct authority governed the case, because in the previous cases "there was either a statement signed by the proposer that his answers to the questions put to him were true, and that he warranted them to be true; or there was a clause in the policy that if any of the statements were untrue the policy was to be void" (5).

(1) (1884) 9 App. Cas., pp. 692, 693.
(2) (1873) 11 Macph. (Ct. of Sess.) 351.
(3) (1884) 9 App. Cas., at pp. 693, 694.
(4) (1922) 2 A.C. 413.
(5) (1922) 2 A.C., at p. 435.

With regard to the case of *Dawsons Ltd.* v. *Bonnin* (1), it seems that Lord *Dunedin* either thought or assumed that it was sufficient to make prior representations of fact "contractually material" if (1) they were contained in the proposal, and (2) it was proved that the proposal was accepted and (3) the assured signed a declaration in the proposal that the representations were true, that they were the "basis of the contract," and that, if they were untrue, the contract would be at an end.

In the Court of Session judgments, that of Lord *Anderson* seems to have met with the approval of the House of Lords (see per Lord *Haldane* (2)). Lord *Anderson* said :—

"It was maintained for the pursuers that the above statement was merely a representation because (1) it was not expressly said to be a warranty, and (2) there was no declaration of truth appended to the proposal form and signed by the insured. It seems to me that it is well decided that there is a third category of case in which a statement of the insured in a proposal form must be dealt with as if it were an express warranty, that, namely, in which the statements made in the proposal form are made the basis of the contract of insurance" (*Dawsons Ltd.* v. *Bonnin* (3)).

A perusal of the arguments and judgments, both in the Court of Session and the House of Lords, rather suggests that it was accepted by all the Judges that the above-mentioned opinion or assumption of Lord *Dunedin* was correct. Lord *Dundas*, for instance, said :—

"In the next place, I think that the cases cited by the Lord Ordinary, and other decisions, establish that where, in a contract of insurance (e.g., as in" *Thomson* v. *Weems* (4)), "the insured has subscribed a declaration at the foot of his filled-in proposal form, which is declared to be the basis of the contract, and which imports that the statements made by him are true, and that if any untrue statement has been made, or necessary information withheld, the contract shall be null and void, then that declaration, taken in connection with the policy, constitutes an express warranty of the truth of the answers he has given; and accordingly, if an answer be false, there is no room for inquiry into its materiality. Here, however, there is no such declaration under the hand of the insured; it is only in the policy (which he does not subscribe) that we find that the proposal shall be the basis of the contract, and be held as incorporated therein. I am not, as at present advised, prepared to accept the Lord Ordinary's assumption that the legal position is the same. It seems to me that it may well be that there is a material difference between a case such as the present and such cases as those cited by the Lord Ordinary" (5).

(1) (1922) 2 A.C. 413.
(2) (1922) 2 A.C., at p. 425.
(3) (1921) S.C. 511, at pp. 513, 514.
(4) (1884) 9 App. Cas. 671.
(5) (1921) S.C., at p. 518.

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

Evatt J.

And Lord *Ormidale* said :—

"In the cases, however, referred to by the Lord Ordinary as supporting the view taken by him, it appears that there was a declaration signed by the insured on the proposal form to the effect that his answers to the questions put were true, and that, if any of his statements were untrue, then the policy should be void" (1).

In *Australian Widows' Fund Life Assurance Society Ltd.* v. *National Mutual Life Association of Australasia Ltd.* (2) there was a recital in the policy of reinsurance that the appellant society had agreed to accept the proposal of the respondent association, and the Judicial Committee was not satisfied that the effect of this recital was to incorporate in the policy all the terms of the proposal for reinsurance (3). Lord *Parker of Waddington* said :—

"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 reinsurance, 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" (3).

It will be noted that, in this case, the denial by the Privy Council of the "incorporation" in the policy of the proposal itself, as distinct from the statements contained in the proposal, was made in relation to a statement in the proposal that it was understood that, in accepting the risk under the reinsurance, the appellant society did so on the same terms and conditions as those on which the respondent had granted the primary policy. It was emphasized that the express terms of the policy of reinsurance "are in almost every respect different from the terms of the original policy" (4).

In that case the Privy Council was not concerned with any such question as we have before us at present. They refused to draw the inference that the mere recital in a policy of the acceptance of a proposal, of itself and by itself, operated to incorporate in the policy everything contained in the proposal. But, in the present case, the policy repeats many of the terms of the proposal and is not contradictory of any of them. And the only question is whether the declaration by the respondent that the statements contained in the proposal were true and were the basis of the contract, is to be

(1) (1921) S.C., at p. 520.
(2) (1914) A.C. 634; 17 C.L.R. 657.
(3) (1914) A.C., at p. 641; 17 C.L.R., at p. 662.
(4) (1914) A.C., at p. 642; 17 C.L.R., at p. 663.

given recognition. In other words, the case of the appellant does not depend upon the mere fact of the recital in the policy of the acceptance of the proposal, except for the purpose of negativing the suggestion that the policy represents any departure from the declaration in the proposal that the statements made were to be contractually material.

In *Condogianis* v. *Guardian Assurance Co.* (1) Lord *Shaw of Dunfermline*, in delivering the judgment of the Privy Council, rested the case upon a declaration contained in the proposal to the effect that "this proposal is the basis of the contract and is to be taken as part of the policy and (if accepted) the particulars are to be deemed express and continuing warranties furnished by or on behalf of the proponent."

> "The case accordingly," says the judgment, "is one of express warranty. If in point of fact the answer is untrue, the warranty still holds, notwithstanding that the untruth might have arisen inadvertently and without any kind of fraud. Secondly, the materiality of the untruth is not in issue; the parties having settled for themselves—by making the fact the basis of the contract, and giving a warranty—that as between them their agreement on that subject precluded all inquiry into the issue of materiality" (2).

Now it is true, as has been pointed out in the Supreme Court, that the policy contained a proviso to the effect that the proposal was to be considered as relevant to and incorporated in the policy. (See *Guardian Assurance Co.* v. *Condogianis* (3).) But the Privy Council judgment is not expressed to be founded in any way upon such proviso, and it treats the terms of the declaration in the proposal signed by the assured as binding upon him because the statements therein made became part of the contract between the parties and were therefore contractually material.

In the case of *Joel* v. *Law Union and Crown Insurance Co.* (4), a case of life insurance, the assured made two declarations prior to the issue of the policy. The first declared that the particulars given were true, and "that this proposal and declaration shall be the basis of the contract." There was also a second declaration that certain answers given to a doctor were true, but such declaration

(1) (1921) 2 A.C. 125; 29 C.L.R. 341.
(2) (1921) 2 A.C., at p. 129; 29 C.L.R., at p. 343.
(3) (1919) 26 C.L.R. 231, at pp. 234, 235, per *Barton* J.
(4) (1908) 2 K.B. 431, 863.

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

Evatt J.

did not state that the answers were to form part of the basis of the contract. Lord *Alverstone* C.J. said :—

"The first question is one of construction, and, in my opinion, of considerable difficulty, and I express my opinion thereon not without some doubt. The policy, which was dated November 4, 1902, was absolute in its terms, and contained no reference either to the proposal form or to the answers to the questions : but, in my opinion, having regard to the decision of *Wood* v. *Dwarris* (1), this would be immaterial if, by agreement between the parties, the questions were made the basis of the contract and were untrue in fact" (2).

It was unsuccessfully contended by the insurance company that the truth of the answers by the assured to the questions referred to in the second declaration, was also made part of the basis of the contract. The Court of Appeal agreed with Lord *Alverstone* that the truth of such answers was not warranted or made a condition of the insurance. *Vaughan Williams* L.J., after stating the contention of the defendants, said :—

"I cannot agree. If the insurance office meant this, it lay on them to say so plainly. It would have been very easy to have stated plainly that such answers were to be the basis of the contract, but this is not done" (3).

Fletcher Moulton L.J. said :—

"In other words, the insurers must prove by clear and express language the *animus contrahendi* on the part of the applicant ; it will not be inferred from the fact that the questions were answered, and that the party interrogated declared that his answers were true. This is only what a witness does when he declares he has given true evidence. He is stating his belief, and not making a contract" (4).

Buckley L.J. said in relation to the first declaration :—

"The document dated October 27, 1902, provides that the proposal and declaration shall be the basis of the contract. I do not assent to Mr. *Lush's* argument that it results from this that nothing else was to be the basis of the contract, and I cannot find in Lord *Cranworth's* judgment in *Anderson* v. *Fitzgerald* (5) anything to support the contention that it does. The question is one of construction. It does not follow, because contractually two facts are to be the basis of the contract, that no other facts are to be added to, or are to form part of, the basis" (6).

And he said later :—

"But, secondly, I am of opinion that the facts stated in the document of October 31, 1902, are not contractually added to the facts which are to be the basis of the contract" (7).

And further :—

"There is in all this nothing which makes the applicant's answers in this document the basis of the contract" (7).

(1) (1856) 11 Ex. 493 ; 156 E.R. 925.
(2) (1908) 2 K.B., at p. 437.
(3) (1908) 2 K.B., at p. 874.
(4) (1908) 2 K.B., at pp. 886, 887.
(5) (1853) 4 H.L.C., at p. 503 ; 10 E.R., at pp. 558, 559.
(6) (1908) 2 K.B., at pp. 893, 894.
(7) (1908) 2 K.B., at p. 894.

It seems to me that in *Joel's Case* (1) all members of the Court of Appeal were of opinion that if the statements referred to in the second declaration had been declared therein to be the "basis of the contract," judgment would have been given for the insurance company, although neither of the declarations was referred to in the policy itself. Accordingly most of the debate centred around the question whether the statements referred to in the second declaration were made foundational or basic or root statements such as those referred to in the first declaration.

In *Dalgety & Co.* v. *Australian Mutual Provident Society* (2) *Cussen* J. held that a statement in a proposal for life assurance that "the proponent agrees that the answers or statements shall be the basis of the contract," does not amount to a "warranty" that the statements made in answer to questions are in fact correct. He said:—

> "Where it is arranged that the statements shall be the 'basis of the contract,' this prima facie refers to matters preliminary to the real contract, even in insurance contracts, unless the statements have a contractual obligation attached to them by the policy or formal contract" (3).

In my opinion the word "basis" has come to acquire a meaning with which this statement of the law cannot now be reconciled. In any event the word does not stand unaided in the proposal and declaration contained in the present case. Despite the great weight to be given to all judgments of *Cussen* J., I do not think it can be reconciled with the Court of Appeal's reasoning in *Joel's Case* (1), which, in my opinion, this Court should follow.

Cussen J. seems to base his opinion upon *Wheelton* v. *Hardisty* (4). In that case the defendants were three directors of the Westminster and General Life Assurance Association. The plaintiffs signed a proposal form which gave certain particulars of the risk assured, and then added that "we . . . do hereby declare that we believe the above particulars and statements are true" (5). The policy recited that the plaintiffs were interested in the life of one Jodrell, and had delivered the proposal with the particulars therein referred to, and that the defendants had "thereupon"

(1) (1908) 2 K.B. 863.
(2) (1908) V.L.R. 481; 30 A.L.T. 4.
(3) (1908) V.L.R., at p. 502; 30 A.L.T., at p. 10.
(4) (1857) 8 E. & B. 232; 120 E.R. 86.
(5) (1857) 8 E. & B., at p. 243; 120 E.R., at p. 91.

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

Evatt J.

undertaken the proposed insurance. Counsel for the plaintiffs said: "The usual course in life insurance is to append to the proposal . . . a declaration that the statements are absolutely true, and that if they are not true the policy shall be forfeited" (1).

The appeal to the Exchequer Chamber was upon motion for judgment *non obstante veredicto* and the terms of the proposal, not having been set out in the relevant pleadings, were not before the Court. But that being so, the assumption upon which the appeal turned was that there was no undertaking in the proposal form supporting the insurer's case, an assumption that was in fact correct. *Martin* B. said:—

> "Upon the record, therefore, it does not appear that any stipulation was, as usual, introduced, that the statement in question should be the basis of the contract" (2).

He said further:—

> "The cases cited for the defendants, to show that the representation, whether fraudulent or not, if merely untrue, avoided the contract, failed to show that such a rule applied to life policies, unless the policy contained a direct provision that the truth of such representation was to be the basis of the policy" (3).

Willes J. said:—

> "The mere recital of such a statement in the policy would not alter the general law, or convert such statement from a mere matter of representation into a condition precedent" (4).

Bramwell B. said:—

> "The truth of the statement by the plaintiffs is not a condition precedent to the liability of the defendants upon the policy. It is clearly not a condition precedent in terms; and I agree with my brother *Martin* that, in the absence of any express stipulation in the instrument containing such statement, making the truth of it a condition precedent, we ought not to adopt that construction except upon very clear indications that it was the intention of the contracting parties that the statement should have that effect" (5).

It is clear that the members of the Court of Exchequer Chamber were not concerned with such a case as the present. The fourth plea, held to be bad in substance, read with the declaration, merely showed three facts, namely, (1) that, in the proposal form, the insured made a declaration containing statements as to the health of the life assured, which were not true in fact; (2) that after

(1) (1857) 8 E. & B., at pp. 247, 248; 120 E.R., at p. 93.
(2) (1858) 8 E. & B. 285, at p. 297; 120 E.R. 106, at pp. 110, 111.
(3) (1858) 8 E. & B., at p. 297; 120 E.R., at p. 111.
(4) (1858) 8 E. & B., at p. 299; 120 E.R., at p. 111.
(5) (1858) 8 E. & B., at pp. 299, 300; 120 E.R., at p. 112.

receiving the proposal, a policy was issued which recited the delivery of the proposal form containing such statements; and (3) that there was no other mention of the proposal in the policy.

Not only did counsel for the plaintiffs rely upon the absence of anything in the proposal form containing a declaration that if untrue statements were made, the policy should be forfeited; but *Bramwell* B. rather suggests that if the "instrument containing such statement" had made the truth of the statement a condition precedent to liability, the defendants would have succeeded. The word "instrument" may as well refer to the proposal form as to the policy itself. At any rate, it was not necessary to consider a case such as the present, so that *Wheelton* v. *Hardisty* (1) is not an authority which is against the present appellant.

On the other hand, *Anderson* v. *Fitzgerald* (2) is not an authority directly in the appellant's favour, because there, not only did the declaration attached to the proposal state that the particulars given should form the basis of the contract and that if untrue allegations were made the policy should be void, but the policy itself also had a proviso that if any "false" statements had been made "in or about" the obtaining of the insurance, the policy should be void. The insurance company was successful, the ground of decision being the fact that the proviso in the policy was applicable to statements in the proposal which were untrue though neither material nor fraudulent. But Lord *Cranworth* L.C. said (3):—

> "Nothing, therefore, can be more reasonable than that the parties entering into that contract should determine for themselves what they think to be material, and if they choose to do so, and to stipulate that unless the assured shall answer a certain question accurately, the policy or contract which they are entering into shall be void, it is perfectly open to them to do so, and his false answer will then avoid the policy. Now it appears to me, my Lords, that that is precisely what has been done here. The parties entering into the assurance have so stipulated. 'The basis of our contract shall be your answering truly these two questions.' There were a great many others; but, putting those aside, they say the basis of the contract between us shall be that you shall answer truly those two questions, and if you do not answer them truly the policy shall be void."

This observation seems to refer to the declaration rather than to the proviso in the policy. But the Judges who were summoned to

(1) (1857) 8 E. & B. 232; 120 E.R. 86; (1858) 8 E. & B. 285; 120 E.R. 110.

(2) (1853) 4 H.L.C. 484; 10 E.R. 551.

(3) (1853) 4 H.L.C., at p. 503; 10 E.R., at pp. 558, 559.

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

Evatt J.

aid the House of Lords left the point open because Baron *Parke* said (1):—

> "This question does not appear to us to turn upon the well-known distinction between warranties and representations laid down by Lord *Mansfield*, nor upon the point whether the declaration above mentioned was either a part of the contract binding between the parties independent of the policy, or meant to be referred to by it. The proviso is clearly a part of the express contract between the parties, and on the non-compliance with the condition stated in the proviso the policy is unquestionably void."

It is here that a difficulty may be considered. In the present case, the last condition of the policy was as follows:—

> "Provided that if any material information shall have been withheld or omitted from the proposal and statement above mentioned, or from the documents therein referred to, or if any material misrepresentation shall have been made in the said proposal and statement or other documents, then this policy shall be null and void and all premiums paid thereon shall be forfeited to the Company."

And it has been contended that this condition would not be necessary if the stipulations of the proposal are to be regarded as an integral part of the contract. The last part of the proposal seeks to avoid the contract if material information is withheld (i.e., suppressed); the condition repeats that, but also avoids in the event of material information being omitted (i.e., not disclosed). The condition avoids the contract in the case of "material" misrepresentation. But the last part of the proposal seeks to avoid in the case of "any untrue statement" having been made.

The apparent contradiction can, I think, be resolved by paying regard to the fact that the promises, both in the condition and the proposal, are hypothetical in form. Each declares that in the case of a stated event the contract (or policy) shall be void. Although there is some overlapping in the description of the supposed events, the more satisfactory way of regarding the transaction is to declare avoidance of the policy upon the happening of any one of the supposed events.

At any rate the cases of *Dawsons Ltd.* v. *Bonnin* (2) and *Condogianis* v. *Guardian Assurance Co.* (3) seem to indicate that the maxim *Expressio unius est exclusio alterius* is hardly applicable to a case where avoidance of a policy of insurance is expressed to result

(1) (1853) 4 H.L.C., at p. 496; 10 E.R., at p. 556.

(2) (1922) 2 A.C. 413.

(3) (1921) 2 A.C. 125; 29 C.L.R. 341.

indifferently from a number of events expressed in different parts of the contractual documents, merely because the events are not all mutually exclusive. So here. There is not so much contradiction as overlapping definitions, all the events defined leading to one end, i.e., avoidance.

If I am right in thinking that, apart from the last proviso in the actual policy, the respondent would be bound contractually by the stipulations contained in the proposal, what difference does the proviso make? No doubt its terms must be considered *before* arriving at a conclusion against the respondent as to the contractual character of the representations in the proposal. If there were a clear contradiction between the proviso and a provision that the falsity of the representations in the proposal should avoid the contract, that would be a ground for refusing to include the terms of the declaration in the contract between the parties. But the discussions in *Condogianis* v. *Guardian Assurance Co.* (1) and *Dawsons Ltd.* v. *Bonnin* (2) show that although there is "overlapping" between two clauses of an insurance contract, each providing for the avoidance thereof if representations are untrue, that is not a ground for giving a restrictive interpretation to one of the clauses (*Dawsons Ltd.* v. *Bonnin* (3); *Condogianis* v. *Guardian Assurance Co.* (4)).

I agree that the question is not precisely the same here, where the first controversy is whether the somewhat "overlapping" provision in the declaration enters at all into the area of binding contract. But the question is closely analogous. Even if the declaration were regarded as a collateral agreement to that contained in the policy (a view which I do not accept), there would not be such "inconsistency" between the terms of the two promises as would compel the denial of legal effect to the collateral promise. Indeed the "overlapping" is explained by the desire of the insurer for greater protection. It is not a case of contradiction or conflict at all for that would make the position very different. In *Hoyt's Pty. Ltd.* v. *Spencer* (5) *Isaacs* J. said:—

> "To the extent to which the parties have deliberately agreed to record any part of their contract, that record stands unimpeachable by oral testimony . . . It may be that the parties have, in their discretion, chosen to record a single

(1) (1921) 2 A.C. 125; 29 C.L.R. 341.
(2) (1922) 2 A.C. 413.
(3) (1922) 2 A.C., per Viscount *Haldane* at p. 424, Viscount *Cave* at p. 433, Lord *Dunedin* at p. 435.
(4) (1921) 2 A.C., at p. 130, per Lord *Shaw of Dunfermline*; 29 C.L.R., at p. 344.
(5) (1919) 27 C.L.R. 133, at p. 144.

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

Evatt J.

bargain in several documents contemporaneously, or so close in point of time that they are treated as being contemporaneously executed. In that case, as *Jessel* M.R. says in *In re Wedgwood Coal and Iron Co.*; *Anderson's Case* (1), ambiguities and even inconsistencies have to be resolved and reconciled as best the Court can. The same thing is said by the same learned Judge in *Smith* v. *Chadwick* (2). In such case, if there be an action on the whole agreement as one entire indivisible agreement, the whole of the documents are read together, and the words of one may have to be modified by the words of another."

In my opinion the general principle covers the case, the proposal's declaration is part of the binding contract, and the question of construction of the declaration and the policy together is largely determined by the authorities cited.

As for the facts, I did not understand it to be disputed that A. O. Coventry did " require medical advice " on more than one occasion within five years before May 22nd, 1926. He visited a leading Sydney specialist on April 6th, 1923, and on May 24th, 1925. Also, he was professionally attended to by Dr. Bryden on June 7th, 1922, and on August 20th, 1924. It follows that the particulars as to A. O. Coventry's health furnished to the reinsurance Company with the proposal, were untrue. But the respondent undertook that these particulars, with the others, were to be " the basis of the contract," and that " if any untrue statements shall have been made," the contract should be void.

The fifth plea of the appellant was therefore established, and I agree with *James* J. and *Davidson* J. that the appellant is entitled to judgment.

Judgments in relation to insurance companies which give effect to legal points of a technical character are often accompanied by expressions of regret or indignation that the company has succeeded. In the present case, at all events, there is little room for the comment. The operation which insurance companies have so frequently performed upon members of the public, has, in my opinion, been successfully performed upon one insurance company by another.

The appeal should be allowed, and judgment entered for the appellant Company.

(1) (1877) 7 Ch. D. 75, at p. 99.

(2) (1882) 20 Ch. D. 27, at pp. 62, 63.

McTiernan J. The first question is whether it was agreed between the parties that the accuracy of the representation in the personal statement of the "life" assured, namely, that he required medical advice once within the preceding five years, should be a condition precedent to the appellant's liability under the contract of reassurance. In the operative part of the instrument, described as a policy of reassurance, there is a condition in the following terms: "Provided that if any material information shall have been withheld or omitted from the proposal and statement above mentioned, or from the documents therein referred to, or if any material misrepresentation shall have been made in the said proposal and statement or other documents, then this policy shall be null and void and all premiums paid thereon shall be forfeited to the Company."

It is clear that the terms of this condition do not provide that the validity of the contract was to be conditional on the answers to the questions in the personal statement of the "life" being accurate, whether such answers were of material importance or not. But it was submitted on behalf of the appellant that the contract of assurance contained another condition, cumulative upon those written out in the operative part of the policy of reassurance, namely, a condition in the terms of the declaration which was made in connection with the proposal for the reassurance. The declaration was in the following terms: "Being desirous of effecting a reassurance with the Life Insurance Company of Australia Limited on the above-named life for the benefit of the Producers and Citizens Co-operative Assurance Company of Australia Limited in accordance with this proposal and the stipulations in the policy to be issued in pursuance hereof, I declare and agree that this proposal and declaration, together with the attached copies and particulars as to health, habits and age of the life proposed shall be the basis of the contract between Life Insurance Company of Australia Limited and the Producers and Citizens Co-operative Assurance Company of Australia Limited, and that if any untrue statements shall have been made or any material information withheld, the contract shall be void and all moneys paid on account thereof shall be forfeited."

H. C. OF A. 1932. AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD. McTiernan J.

The word "basis" in this context was defined in *Dawsons Ltd.* v. *Bonnin* (1) to mean something "foundational or essential in the transaction." The appellant's submission is, I think, unsound. In *Macdonald* v. *Law Union Fire and Life Insurance Co.* (2) *Cockburn* C.J., in contrasting the proposal for an insurance with the policy, said that the latter is "the operative instrument." That case was the converse of the present case. The declaration in that case did not distinctly affirm that the proposal was to be the basis of the insurance, but in the policy the declaration was said to be delivered as the basis of the contract. The learned Chief Justice made the statement just mentioned in the course of a submission by counsel that the proposal in question in the case "is not like that in many of the reported cases, which contains a distinct statement on the face of it that it is to form the basis of the contract. After the questions are set out, it simply says, 'I declare that the above particulars are truly set forth.'" The proposal and declaration do not *per se* become an operative part of the contract of assurance. In *Canning* v. *Farquhar* (3) Lord *Esher* M.R., after explaining the steps by which an assurance is effected, said :—"These considerations show that all these statements which are made preliminary to the moment of insurance are not considered by either party as contractual statements, but as expressions of intention on the one side to insure, on the other to accept the risk. That seems to me to be the view at which we must arrive looking at this as a business transaction." A condition in the terms of the proposal would not be incorporated in the contract, except by agreement of the parties. (See also *Roberts* v. *Security Co.* (4).) It is necessary therefore for the appellant to show that the proposal and declaration have been made the basis of the assurance by the terms of the contract of assurance itself. It is not contended that the policy should be rectified to make it a true memorandum of that contract. The appellant relies upon the recital in the policy which contains, *inter alia*, the following phrase "and this proposal has been accepted by the directors," to show what the parties intended should be the basis of the assurance. If the recital has this effect, the terms of the

(1) (1922) 2 A.C., at p. 423.
(2) (1874) L.R. 9 Q.B. 328, at p. 330.
(3) (1886) 16 Q.B.D. 727, at p. 731.
(4) (1897) 1 Q.B. 111.

declaration become an enforceable condition of the contract by which the respondent warranted the existence of a particular state of facts as fundamental and essential to the validity of the transaction. In my opinion that effect should not be given to those words. In this view it is not necessary to determine the applicability to the present case of the principle which should be invoked to interpret a deed when there is a variance between the recital and the operative part. In *Young* v. *Smith* (1) Sir J. *Romilly* M.R. said :—"I have always held that where the recitals and the operative part of a deed are at variance, the operative part must be officious and the recitals inofficious. I do not say inoperative, for the recitals may be useful in explaining ambiguities, but I cannot give to them such effect as to introduce a new covenant into the deed." (See also *Dawes* v. *Tredwell* (2).) The effect of the words relied upon is not, in my opinion, to incorporate in the contract a condition that the proposal and declaration should be the basis of the contract. In this view no question arises whether such a condition would be at variance with the last condition in the operative part of the policy. It may be noted that, if by force of the recital the terms of the declaration must be read into the contract, the last condition in the operative part of the policy would in certain respects be a repetition of the condition thus incorporated. The provisions of a contract of course often overlap. But in the present case the form of the last operative condition may be explained by the fact that the policy was drawn without regard to the terms of the declaration. Whether that be the case or not, the policy was manifestly drawn to express the terms of the contract between the parties, and if in drafting it any regard were had to the terms of the declaration, it is clear that the Company which drafted the policy selected only some of the points mentioned in the declaration for inclusion in the operative part of the policy. The words in the recital, which have been quoted, are not sufficiently clear to require the construction that the terms of the declaration have become embodied in the contract. It may be noted that in the *Australian Widows' Fund Case* (3) the policy of reinsurance contained a recital that the statements contained in the

(1) (1865) L.R. 1 Eq. 180, at p. 183. (2) (1881) 18 Ch. D. 354.
(3) (1914) A.C. 634 ; 17 C.L.R. 657.

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

McTiernan J.

proposal and declaration, together with the statements contained in the personal statements made to the doctors, were the basis of the contract, and were to be deemed to be part thereof and incorporated therewith, and in addition a recital that the appellant society had agreed to accept the proposal of the respondent association. (See also *MacGillivray, Insurance Law*, pp. 856, 857, and cases there cited.) The meaning which I think should be attributed to the phrase " and this proposal has been accepted by the directors " may be expressed in the language of Lord *Parker* of Waddington in the *Australian Widows' Fund Case* (1): " 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 reinsurance, leaving the terms on which such policy was granted to be specified in the ordinary way in the policy itself." In *Joel* v. *Law Union and Crown Insurance Co.* (2) *Fletcher Moulton* L.J. said that " it is plainly the duty of the Court to require the insurers to establish clearly that the insured consented to the accuracy, and not the truthfulness, of his statements being made a condition of the validity of the policy." His Lordship continued :—" No ambiguous language suffices for this purpose. The applicant can be and is called on to answer all questions relevant to the matter in hand. But this is merely the fulfilment of a duty—it is not contractual. To make the accuracy of these answers a condition of the contract is a contractual act, and, if there is the slightest doubt that the insurers have failed to make clear to the man on whom they have exercised their right of requiring full information that he is consenting thus to contract, we ought to refuse to regard the correctness of the answers given as being a condition of the validity of the policy." In support of the view that the words in the recital in the present case, upon which the appellant relies, should not be construed to mean that the proposal and declaration have been made the basis of the assurance, the following passage may be quoted from *Anderson* v. *Fitzgerald* (3), where Lord *St. Leonards*, speaking of a policy of life assurance, said (4) : " It is of course 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."

(1) (1914) A.C., at p. 641 ; 17 C.L.R., at p. 662.
(2) (1908) 2 K.B., at p. 886.
(3) (1853) 4 H.L.C. 484 ; 10 E.R. 551.
(4) (1853) 4 H.L.C., at p. 507 ; 10 E.R., at p. 560.

The second question is whether the terms of the declaration should be enforced against the respondent as a contractual promise collateral to the contract expressed in the policy. It would, in my opinion, be doubtful whether a contract subjecting the respondent to the burden of a condition in the terms of the declaration, annexed to the proposal, could, as a collateral contract, stand with the condition lastly set forth in the operative part of the policy (*Hoyt's Pty. Ltd.* v. *Spencer* (1); *Jacobs* v. *Batavia and General Plantations Trust Ltd.* (2)). But I think that it is not necessary in this case to resolve that doubt. In granting the policy it was not, in my opinion, the intention of the appellant to bring into existence two contracts, namely, the policy itself and a collateral contract for which the policy was a consideration. The respondent put forward the declaration as an offer to enter into a contract containing the conditions mentioned in it. Thereupon a policy was settled which did not embody all the conditions contained in the declaration. The policy was accepted by the respondent, and it became the complete statement of all the conditions of the contract of reassurance. Adopting the language of *Halse Rogers* J. in the Supreme Court (3), "I find it hard to believe that the parties to a commercial transaction of this sort intended their relations to be governed by more than one contract." In *Heilbut, Symons & Co.* v. *Buckleton* (4) Lord *Moulton* said:— "But such collateral contracts must from their very nature be rare. The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by £100, and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract." If the parties in the present case intended that the assurance should be subject to a condition in the terms of the declaration, the more "natural and usual way" to have carried out that intention would have been to put a condition to that effect in the policy itself. In the decisions there are many instances of the adoption of that method, e.g., *Macdonald* v. *Law Union Fire and Life Insurance Co.* (5); *Thomson* v. *Weems* (6);

(1) (1919) 27 C.L.R. 133.
(2) (1924) 1 Ch. 287.
(3) (1931) 31 S.R. (N.S.W.), at p. 561.
(4) (1913) A.C., at p. 47.
(5) (1874) L.R. 9 Q.B. 328.
(6) (1884) 9 App. Cas. 671.

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

McTiernan J.

Dawsons Ltd. v. *Bonnin* (1); *Wheelton* v. *Hardisty* (2); *Australian Widows' Fund Case* (3). It has been stated that the policy in question in the last case recited not only that the statements in the proposal and declaration were the basis of the contract and deemed to be part thereof and incorporated therein, but also that the appellant society had agreed to accept the proposal. In *British Equitable Assurance Co.* v. *Baily* (4) Lord *Robertson* said that the policy was the document "to which one naturally first looks for the contract." There is nothing here except the existence and contents of the two documents, namely, the proposal and policy, which can be relied upon to support the view that the parties made two contracts. It cannot, I think, be presumed that the policy was only a partial statement of the conditions of the assurance and that the granting of it operated as a consideration moving from the appellant in virtue of which a collateral contractual promise in the terms of respondent's declaration was added to the conditions expressed in the policy. It follows from the view which I have taken as to the real terms of the contract of assurance, that there was an issue to be determined by the jury as to the materiality of the statement of the deceased which is alleged to be inaccurate.

But it was contended on behalf of the respondent that in the events which happened, the indorsement on the policy of reassurance imposed an absolute liability upon the appellant to pay the claim which the respondent made under the policy. The terms of the indorsement have been quoted, and it is not necessary to repeat them.

"A contract of insurance and a contract of reinsurance," said *Buckley* L.J. in *British Dominions General Insurance Co.* v. *Duder* (5), "are independent of each other. But a contract of reinsurance is a contract which insures the thing originally insured, namely, the ship. The reinsurer has an insurable interest in the ship by virtue of his original contract of insurance. The thing insured, however, is the ship, and not the interest of the reinsurer in the ship by reason of his contract of insurance upon the ship."

(1) (1922) 2 A.C. 413.
(2) (1857) 8 E. & B. 232; 120 E.R. 86.
(3) (1914) A.C. 634; 17 C.L.R. 657.
(4) (1906) A.C. 35, at p. 39.
(5) (1915) 2 K.B. 394, at p. 400.

(See also *Mackenzie* v. *Whitworth* (1).) The thing insured under the policy of reassurance was the life which was originally assured by the respondent. In *Porter's Laws of Insurance*, 6th ed. (1920), at p. 265, it is said :—" A policy of reinsurance on a life is essentially a contract of indemnity, even independently of any terms contained therein or indorsed thereon. Consequently nothing is payable to the reinsured company until proof be given by it that the sum originally insured has actually been paid " ; and in *Bunyon, The Law of Life Assurance*, 4th ed. (1904), at p. 83 ; 5th ed. (1914), at p. 66, the learned author says :—" The effect of reinsurance seems to have been more often in dispute, and therefore to have been more defined by judicial decision in America, than in the Courts of this country. These decisions turned naturally on the wording of the particular policies there in dispute, and it seems doubtful whether they are of much authority here." (They are collected and discussed in *May* on *Insurance* and in *Porter* on *Insurance*.) " Policies of reinsurance in this country are now usually so drawn as to define precisely the risk and the conditions if any on which it is undertaken." In undertaking the risk in the present case the appellant might have guaranteed the respondent in the sum mentioned, on the life of Coventry, subject to the conditions of the respondent's original policy at a premium to be payable during his life. That course was not followed. A new policy was drafted containing the conditions upon which the appellant has undertaken the risk assured. These conditions upon which the respondent had already assured the life were not adopted. In my opinion, therefore, the parties could not have intended that the effect of the words in the indorsement should be, assuming that the person originally assured had an insurable interest and that the policy were lawful, that the liability of the appellant under the policy of reassurance should attach upon the discharge by the respondent of its liability under the original policy. The clause does not render the last operative condition in the policy of reassurance nugatory. Under that proviso the appellant is entitled to have determined the materiality as between itself and the respondent of the misrepresentation alleged to have been made by the deceased

(1) (1875 1 Ex. D. 36.

H. C. OF A. 1932.

AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LTD. v. PRODUCERS AND CITIZENS CO-OPERATIVE ASSURANCE CO. OF AUSTRALIA LTD.

in the statement which was made by him in connection with the original assurance.

The appeal should be allowed with costs and the judgment of the Supreme Court set aside, and there should be a new trial.

Appeal allowed with costs. Judgment of Full Court of Supreme Court discharged. In lieu thereof order that there be a new trial and that the costs of the former trial abide the event. The defendant, the appellant in this Court, to pay the costs of the motion to the Full Court of the Supreme Court. Costs payable under this order to be set off.

Solicitors for the appellant, *Allen, Allen & Hemsley.*
Solicitors for the respondent, *J. W. Maund & Kelynack.*

J. B.