[HIGH COURT OF AUSTRALIA.]

MARSHALL AND OTHERS . . . . APPELLANTS;
PLAINTIFFS,

AND

THE CITY MUTUAL LIFE ASSURANCE SOCIETY LIMITED . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1934.

ADELAIDE, *Sept.* 26, 27; *Oct.* 5.

Rich, Starke and Dixon JJ.

Insurance—Life assurance policy—Incorporation of articles—Construction—Right to surrender—Contract—Offer and acceptance—Life Assurance Companies Act 1882 (*S.A.*) (*No.* 277), *sec.* 47*.

An insurance society issued to M. a policy of life assurance on his life. M. assigned this policy by way of security. After some correspondence concerning a contemplated surrender of the policy the assignee, on 6th May 1932, wrote to the insurance society as follows :—" We have now definitely decided with the full collaboration of " M. " to surrender the policy immediately, and shall be pleased, therefore, to receive a cheque for the surrender value in due course." The society replied on 12th May 1932 :—" We are in receipt of yours of 6th inst. and regret to note that, after consultation with " M. " it has been decided to surrender the above policy. The following are particulars of the surrender value—subject to confirmation by the actuary " (here followed certain figures). " The necessary discharge forms are enclosed herewith, which will require to be signed by your company and also by " M. " We shall be glad if you will kindly have the forms duly completed, and returned to this office, when the matter will be attended to." The discharge forms were completed, but M. died before they had been returned to the society. The policy did not itself

* Sec. 47 of the *Life Assurance Companies Act* 1882 (S.A.) provides : " Every life assurance society shall declare the surrender value at which the said society becomes bound to accept their policies, and no policy shall lapse to the society for non-payment of premium so long as the premiums and interest in arrear are not in excess of the surrender value."

contain any provision for actual surrender, but it expressly provided that "so long as the surrender value, as fixed by the board," sufficed, the policy should not become void by non-payment of a premium if it had been in force two years. The policy also contained a condition that the insurance should at all times and in all circumstances be subject to the articles of the society. The articles empowered the directors to fix "rates of payment which may be made by the society for the surrender of policies" and provided that after three years' payments had been made on a policy it should acquire a surrender value. Rates of surrender values had in fact been fixed by the directors of the society.

Held, that the letters of 6th and 12th May 1932 expressed a *consensus ad idem* that the policy should be immediately surrendered, and concluded an agreement surrendering the policy for an amount to be calculated by reference to the society's tables of surrender values.

Quære, per Rich and *Dixon* JJ., (1) whether the policy and the articles conferred on the insured a right to require the society to pay the surrender value as ascertained by the rates fixed; (2) whether sec. 47 of the *Life Assurance Companies Act* 1882 (S.A.) requires life societies to give their policies surrender values which shall be payable in cash as well as available to answer unpaid premiums, or merely to declare the rates or values if they do bind themselves to accept surrenders.

Re Mutual Life Association of Australasia and Citizens' Life Assurance Co., (1908) S.A.L.R. 99, discussed.

Decision of the Supreme Court of South Australia (*Murray* C.J.): *Marshall* v. *City Mutual Life Assurance Society Ltd.*, (1934) S.A.S.R. 35, affirmed.

APPEAL from the Supreme Court of South Australia.

On 28th June 1922 Walter Richard Fry Marshall insured his life with The City Mutual Life Assurance Society Ltd. for £3,000. By an assignment in writing dated 26th June 1931 the insured by way of security assigned his interest in the policy to the Adelaide Development Co. Pty. Ltd. In 1932 correspondence took place between the last-mentioned company and the insurance society with reference to a contemplated surrender of the policy. On 6th May 1932 the Adelaide Development Co. Pty. Ltd. wrote to the insurance society as follows: "Following on the interview by the writer when various aspects of the policy were discussed, we have now definitely decided with the full collaboration of Mr. Marshall to surrender the policy immediately, and shall be pleased therefore to receive a cheque for the surrender value in due course." On 12th May 1932 the society sent the following reply:—"We are in receipt

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of yours of 6th inst. and regret to note that, after consultation with Mr. Marshall it has been decided to surrender the above policy. The following are particulars of the surrender value—subject to confirmation by the actuary :—

Surrender value			£937 3 4
Less loan	£162 8 3		
Less overdue premium and interest	154 17 8		
		317	5 11
Balance of surrender value		£619	17 5

The necessary discharge forms are enclosed herewith, which will require to be signed by your company and also by Mr. Marshall. We shall be glad if you will kindly have the forms duly completed and return to this office, when the matter will be attended to."

The discharge forms referred to in this letter were completed, but Marshall died on 6th June 1932 without such forms having been returned to the insurance society. The Adelaide Development Co. Pty. Ltd. was acting with the authority of Marshall in its negotiations for a surrender of the policy.

The policy of insurance contained no provision for actual surrender, but it provided that " if the within policy be kept in force for two years from the commencement of the risk, the non-payment of any subsequent premium shall not void the same so long as the surrender value, as fixed by the board . . . is sufficient for the payment of any such subsequent premium." The policy also provided :—" The assurance hereby made shall at all times and under all circumstances be subject to the articles of association of the society." Article 62 of the insurance society provided that " the directors may . . . fix . . . the rates of payment which may be made by the society for the surrender of policies of any description . . . provided . . . that the directors may allow as the surrender value of any policy or for the surrender value of any portion of any policy such sum as they may deem expedient and equitable." Article 64 provided that, " after three years' payments have been made on any policy, it shall acquire a surrender value. The failure or omission to pay the premium shall not render the policy void so long as such surrender value as fixed by the board,

after deducting therefrom the amount (if any) due by the member to the society in respect of any advance . . . upon the security of such policy is sufficient for the payment of the premium then due." Rates had in fact been fixed by the directors under these articles.

The plaintiffs, the executors of W. R. F. Marshall and the Adelaide Development Co. Pty. Ltd., brought an action against the insurance society, alleging that the policy had never been surrendered and claiming the amount payable thereunder. *Murray* C.J. dismissed the action.

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

Ligertwood K.C. (with him *Abbott*), for the appellants. No right of surrender was conferred by the policy or by the *Life Assurance Companies Act* 1882. The object of sec. 47 of the Act is to require an insurance company to declare a surrender value, if there is a right to surrender. Here the Act does not apply, because the company has not agreed to pay the surrender value (*Re Mutual Life Association of Australasia and Citizens' Life Assurance Co.* (1); *Equitable Life Assurance Society of the United States* v. *Reed* (2)). The letters of 6th and 12th May 1932 did not constitute an agreement to surrender. The transaction was incohate only, and either party could withdraw before settlement. No amount was ever agreed on (*Kennedy* v. *Thomassen* (3); *Strickland* v. *Turner* (4)). *Baines* v. *Woodfall* (5) is distinguishable, because there the offer made was as definite as could be.

Alderman (with him *Wald*), for the respondent. The policy had a cash surrender value and, by virtue of the policy and the articles incorporated therein, there was a continuing offer to accept a surrender (*Ingram-Johnson* v. *Century Insurance Co.* (6)). This offer was accepted by the letter of 6th May 1932. On surrender a cash sum was payable, and under sec. 47 of the *Life Assurance*

(1) (1908) S.A.L.R. 99.
(2) (1914) A.C. 587.
(3) (1929) 1 Ch. 426.
(4) (1852) 7 Ex. 208; 155 E.R. 919.
(5) (1859) 6 C.B. N.S. 657; 141 E.R. 613.
(6) (1909) S.C. 1032.

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Companies Act the society was bound to accept the surrender (*Johanson* v. *City Mutual Life Assurance Society Ltd.* (1)).

[DIXON J. referred to *Equitable Life Assurance of the United States* v. *Bogie* (2).]

Mortgage Insurance Corporation v. *Commissioners of Inland Revenue* (3) indicates that such a policy as this is a contract not merely to pay a fixed sum but to do varying things in varying circumstances. Even if the policy contains no continuing offer to accept a surrender, the true meaning of sec. 47 of the *Life Assurance Companies Act* is that, if a surrender value is declared, the company must accept a surrender at that figure; otherwise there is no room for the words " at which the said society becomes bound to accept their policies." " Surrender value," at least prima facie, means a cash value, and the words should be given their ordinary meaning. The letters of 6th and 12th May 1932 operate together as an offer and acceptance. The first paragraph of the second letter standing alone amounts to an acceptance, and the later part of the letter relates merely to carrying out the details of the contract. *Simpson* v. *Hughes* (4) and *Perry* v. *Suffields Ltd.* (5) show what words added to an acceptance amount to further negotiations. The " surrender value " referred to is the value as fixed by the tables which all parties assume govern the transaction. Prior conversations and correspondence must be regarded in interpreting the contract (*Bank of New Zealand* v. *Simpson* (6)).

Ligertwood K.C., in reply. There is no warrant for stating that the " surrender value " is an amount which the insured is entitled to receive on surrendering the policy (*Equitable Life Assurance of the United States* v. *Bogie* (7)). Each insurance company has its own scheme with regard to surrender values, and a reference to its surrender value confers no rights. This policy confers no right to demand a sum of money on surrender nor does the incorporation of the articles affect the position. The articles are carefully phrased to prevent the assured from having such a right. The words are

(1) (1904) Q.S.R. 288.
(2) (1905) 3 C.L.R. 878, at p. 909.
(3) (1888) 21 Q.B.D. 352, at p. 357.
(4) (1897) 13 T.L.R. 271.
(5) (1916) 2 Ch. 187, at p. 191.
(6) (1900) A.C. 182.
(7) (1905) 3 C.L.R., at p. 889.

words of power, not of obligation. The parties did not agree that the policy had a definite surrender value. The transaction related not only to surrender value, but to overdue premium and loan as well, and no contractual relationship was formulated between the parties until the receipt was prepared. The importance of this aspect appears from *Kennedy* v. *Thomassen* (1) and *Strickland* v. *Turner* (2).

Cur. adv. vult.

Oct. 5.

The following written judgments were delivered :—

RICH AND DIXON JJ. The question upon which this appeal depends is whether a policy of life insurance was effectually surrendered before the death of the insured. He died on 6th June 1932, and, by the judgment under appeal, *Murray* C.J. has decided that a surrender, or binding contract to surrender, was effected on 12th May 1932. The policy had been assigned by way of security and the assignees, with the full authority of the insured, determined to surrender the policy, and, on that date, informed the insurers, a mutual society, of their determination. The insured executed the formal receipt for the moneys representing the surrender value, but his death occurred before the document was presented to the insurer and before the moneys were paid over.

The policy of insurance does not itself contain any provision for actual surrender, but it expressly provides that, " so long as the surrender value, as fixed by the board " sufficed, the policy should not become void by non-payment of a premium, if it had been in force two years. The policy also contains a condition that the insurance should at all times and in all circumstances be subject to the articles of the society, and the articles include provisions with reference to surrender. By one article, it is provided that the directors may fix the rates of payment which may be made by the society for the surrender of policies of any description and may from time to time alter such rates, and, by another, that after three years' payments have been made on any policy it shall acquire a surrender

(1) (1929) 1 Ch. 426. (2) (1852) 7 Ex. 208 ; 155 E.R. 919.

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value. The latter article proceeds to deal with the use of the surrender value so fixed by the board to preserve the policy notwithstanding non-payment of premiums. The former is subject to a proviso empowering the directors to allow as the surrender value of a policy such sum as they might deem expedient and equitable. Rates have in fact been fixed by the directors under these articles. If, upon their proper construction, they mean to require the society to pay the surrender value as ascertained by the rates fixed, to the insured, who, of course, in virtue of the insurance becomes a member of the society, then by notifying the society of their decision to surrender, the assignees of the policy might well be considered to have exercised an election from which they could not retract to take the surrender value and terminate the insurance upon the life. But it is open to doubt whether the language of the articles bears this construction. The rates to be fixed are "the rates of payment which *may* be made by the society for the surrender of policies" not, which shall be made. The words are permissive and confer a power rather than express a requirement. On the other hand, a definite statement is made that a policy shall acquire a surrender value, a statement at least capable of meaning that it shall acquire a value expressed in money obtainable on surrender. But, perhaps, it should be understood as meaning no more than that the policy should have ascribed to it a surrender value for the purpose of keeping the policy alive.

In South Australia, however, there is a special legislative provision relating to surrender value which must be considered with the articles. Sec. 47 of the *Life Assurance Companies Act* 1882 contains the following enactment: "Every life assurance society shall declare the surrender value at which the said society becomes bound to accept their policies, and no policy shall lapse to the society for non-payment of premium so long as the premiums and interest in arrear are not in excess of the surrender value." This provision is in a very different form from that enacted in New Zealand two years afterwards, namely, sec. 32 of the *Life Assurance Policies Act* 1884 (N.Z.), upon which, as sec. 64 of the *Life Insurance Act* 1908 (N.Z.), *Equitable Life Assurance Society of the United States* v. *Reed* (1)

(1) (1914) A.C. 587.

was decided, and also from the still later Queensland adaptation of the New Zealand provision, namely, sec. 22 of the *Life Assurance Companies Act* 1901 (Q.), upon which *Equitable Life Assurance of the United States* v. *Bogie* (1) was decided.

It seems not unlikely that the framers of the South Australian provision intended to require life societies to give their policies surrender values which should be payable in cash as well as available to answer unpaid premiums. But the Supreme Court of South Australia has construed the section as meaning not that the societies shall become bound to accept surrenders and provide for premiums at surrender values which they must declare, but that, if they do bind themselves to accept surrenders, they shall declare the rates or values (*Re Mutual Life Association of Australasia and Citizens' Life Assurance Co.* (2)). It must be conceded that some support for this view of the enactment may be found in the form of the eleventh question in the Seventh Schedule, which by sec. 20 life societies must answer. It would appear from *Equitable Life Assurance Society of the United States* v. *Reed* (3) that the obligation to " declare " the surrender values should be understood as referring to the answer to this question. But the Schedule speaks of " a table of minimum values (if any) allowed for the surrender of policies." The " if any " suggests that it is left to the society to adopt a system of surrender values, or not to do so. Further, if sec. 47 imposes an obligation to allow a surrender value, in terms it appears to apply to all cases. But it is difficult to believe that it was intended to give a policy a surrender value, although not more than one premium had been paid. On the other hand, to construe sec. 47 as requiring no more than a declaration of surrender values, if any have been adopted, does not seem to give it any more effect than sec. 20 and the eleventh question of the Seventh Schedule combine to produce. *Murray* C.J., following the decision of the Full Court, treated the society as under no obligation to have a surrender value, but, proceeding upon the footing that the insured had no right to payment of a surrender value and that it lay within the power of the society to refuse a surrender, he held, nevertheless,

(1) (1905) 3 C.L.R. 878. (2) (1908) S.A.L.R. 99.
(3) (1914) A.C., at p. 596.

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that the parties had arrived at a concluded agreement for a surrender. Unless this conclusion appears erroneous, it is unnecessary to decide the question whether sec. 47, or the clauses in the articles, or both in combination, give the assured a right to a surrender at the rates fixed by the directors. Upon the assumption that he has no such right, we think the conclusion of *Murray* C.J. is not erroneous, but gives a just effect to the communications between the parties. In these circumstances, we think it is better to leave undecided the question whether that assumption is correct. But, in considering the effect of what the parties did, the articles of association cannot be left out of account. One important consequence of the articles, and perhaps of the section, is that tables exist by which the surrender value of the policy in question must be ascertained. These tables of rates had been fixed by the board and governed the amount which, in the event of a surrender, must be paid, unless the board did, what was not in contemplation, viz., increased the amount by a special direction.

The assignees of the policy had, in March 1932, obtained from the society a statement, subject to confirmation by the actuary, of the amount of the surrender value less overdue premiums, loan moneys and interest. They then expresssd an intention of surrendering. Some delay occurred during which the assignees interviewed the insured. Then, in May 1932, the surrender was again discussed with the society. As a result, the assignees wrote that they had now, with the full collaboration of the insured, definitely decided to surrender the policy immediately, and would be pleased to receive a cheque for the surrender value in due course. The society, on 12th May 1932, replied that they regretted to note that, after consultation with the insured, it had been decided to surrender the policy. The letter continued—" The following are particulars of the surrender value, subject to confirmation by the actuary." It then set out the surrender value and the deductions for overdue premium and loan, calculating interest up to a day or so before the actual date of the letter. It went on: " The necessary discharge forms are enclosed herewith which will require to be signed by " the assignees and the insured. The letter ended by requesting completion of the forms and their return to the office, " when the matter will be attended to."

The forms were completed but not returned because the death of the insured intervened.

These communications appear to us to express a *consensus ad idem* that the policy should be surrendered, not in the future, but immediately, and that the amount of the surrender value, ascertained according to the appropriate tables of the society, less overdue premium, loan moneys and interest to that time, should be paid to the assignees. The calculation of the amount was not intended to precede final mutual agreement but was to be done in pursuance of the common agreement for surrender. The failure of the assignees or the insured to express agreement upon the figures stated by the society and the reservation contained in the words "subject to confirmation by the actuary" are alike unimportant. Neither relates to a necessary term of the agreement. They relate to the ascertainment of the money sum in the manner agreed upon. No intention appears of making the execution of the receipts a condition of the surrender. The surrender was agreed *de presenti*, the receipts were to be acknowledgements of payment. (See per Lord *Dunedin* in *Ingram-Johnson* v. *Century Insurance Co.* (1)).

For these reasons we think that the contract of insurance expressed in the policy was rescinded or discharged by an agreement for surrender.

In our opinion the appeal should be dismissed with costs.

STARKE J. The City Mutual Life Assurance Society Ltd. issued to Walter Richard Fry Marshall a policy of life assurance dated 3rd September 1930, on his life, for the sum of £3,000. Marshall assigned this policy to the Adelaide Development Co. Pty. Ltd. Some correspondence took place concerning the surrender of the policy. On 6th May 1932 the Adelaide Development Co. Pty. Ltd. wrote the following letter to the insurance society:—"Following on the interview by the writer, when various aspects of the policy were discussed, we have now definitely decided, with the full collaboration of Mr. Marshall, to surrender the policy immediately, and shall be pleased, therefore, to receive a cheque for the surrender value in due course."

(1) (1909) S.C., at p. 1036.

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Starke J.

On 12th May 1932 the society replied as follows:—"We are in receipt of yours of 6th inst. and regret to note that, after consultation with Mr. Marshall, it has been decided to surrender the above policy. The following are particulars of the surrender value —subject to confirmation by the actuary:—

Surrender value			£937 3 4
Less loan	£162 8 3		
Less overdue premium and interest	154 17 8		
		317	5 11
		£619	17 5

The necessary discharge forms are enclosed herewith, which will require to be signed by your company and also by Mr. Marshall. We shall be glad if you will kindly have the forms duly completed, and return to this office, when the matter will be attended to."

Marshall died on 6th June 1932, but the discharge forms, though completed, were never returned to the insurance society. The executors of Marshall, and the Adelaide Development Co. Pty. Ltd., brought an action against the society for the moneys assured by the policy. The action was tried before the learned Chief Justice of the State of South Australia, who held, and in my opinion rightly held, that the parties, in the letters already set out, concluded an agreement surrendering the policy for an amount calculated according to the society's tables, less loan and interest due to the society. The society, in the ordinary course of its business, accepted the surrender of its policies and had tables in use from which surrender values might be calculated. This practice was common in Australia, with many if not all insurance offices, and was well known to business men and others in the community. The business meaning of the letters, in these surroundings, is that the parties took advantage of the practice and made an agreement to surrender the policy on the table terms, less what was owing to the society. "Subject to confirmation by the actuary" is a mere stipulation that the actuary shall settle the figures in pursuance of the agreement. The discharge forms sent with the letter are mere acknowledgments of

payment. In this view, I do not find it necessary to express any opinion upon the other matters raised in argument and in the judgment of the Chief Justice.

The appeal should be dismissed.

Appeal dismissed with costs.

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Solicitors for the appellant, *Lempriere, Abbott & Cornish.*

Solicitor for the respondent, *Irvine D. Wald.*

C. C. B.

[HIGH COURT OF AUSTRALIA.]

VACUUM OIL COMPANY PROPRIETARY LIMITED . . . . . PLAINTIFF;

AND

THE STATE OF QUEENSLAND AND OTHERS DEFENDANTS.

[No. 2.]

Constitutional Law—State legislation—Infringement of Federal Constitution—Severability—Motor Spirit Vendors Act 1933 (*Q.*) (24 *Geo. V. No.* 11).

The High Court having held upon demurrer that the *Motor Spirit Vendors Act* 1933 (Q.) infringed sec. 92 of the Constitution and, to the extent to which it did so, was invalid (*Vacuum Oil Co. Pty. Ltd.* v. *Queensland, ante,* p. 108):

Held, by *Gavan Duffy* C.J., *Rich, Dixon, Evatt* and *McTiernan* JJ. (*Starke* J. dissenting), upon the trial of the action, which was referred to the Full Court, that, as framed, the Act was not severable and was therefore wholly invalid.

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MELBOURNE, *Oct.* 16, 17, 1934; *Mar.* 11, 1935.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

ACTION referred to Full Court.

The Vacuum Oil Co. Pty. Ltd. brought an action against the State of Queensland, the Attorney-General, the Treasurer and the