[HIGH COURT OF AUSTRALIA.]

THE SOUTHERN CROSS ASSURANCE COMPANY LIMITED . . . . . Defendant, } Appellant;

AND

THE AUSTRALIAN PROVINCIAL ASSURANCE ASSOCIATION LIMITED . . . . Plaintiff, } Respondent.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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Sydney, *June* 11, 13; *Aug.* 8.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Life Assurance—Reinsurance—Indemnity—Construction—Insurable interest—Statement by original assured—Correctness—Omissions—Materiality.

Whether a contract by way of reinsurance is a contract merely of indemnity depends upon the construction of the contract. The parties thereto may adopt any terms and conditions they choose provided they are consistent with the requirement that, at the time of the reinsurance, an insurable interest shall exist and with the limitation of the amount recoverable to the value of that interest.

The respondent issued a policy of life assurance and obtained from the appellant a policy, headed "Whole life reassurance policy with profits" and described in a recital as a "reassurance," whereby the appellant agreed to pay the respondent £2,000 on the death of the life assured and also agreed to indemnify the respondent against liability under the primary policy for amounts payable to the assured in events other than death and for bonuses.

Held that the promise to pay the sum of £2,000 was absolute and not merely a promise of indemnity against liability under the primary policy.

In a personal statement made, in 1927, by a proponent for life assurance the questions, (*a*) "Have you undergone any surgical operation or suffered from

any serious illness or accident ? " and (*b*) " Have you consulted any doctor during the last ten years ? If so, give details hereunder ", were answered : (*a*) " Typhoid, 40 years ago," and (*b*) " Yes." In the space provided under question *b*, and headed " Nature of operation, illness or accident," he stated that two years previously he had been treated for influenza by a physician whom he named, and he declared that the statements made by him in the document were, " to my knowledge and belief, strictly correct, no material information having been withheld." It was shown in evidence that his physician treated him in 1918 for constipation, in 1920 for an inflamed toe, and once in 1924 and twice in 1926 for digestive troubles.

Held that the proponent was not, by the form of the questions, required to recollect and disclose every occasion on which he had consulted a doctor during the previous ten years, however slight or trivial the ailment, indisposition or injury, but that question *b* should be read as relating to things which might be considered operations, illnesses or accidents ; and that, on the evidence, the jury was entitled to find that the proponent's answers to the questions were not untrue.

Decision of the Supreme Court of New South Wales (Full Court) : *Southern Cross Assurance Co. Ltd.* v. *Australian Provincial Assurance Association Ltd.*, (1935) 35 S.R. (N.S.W.) 193 ; 52 W.N. (N.S.W.) 49, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales by the Australian Provincial Assurance Association Ltd. to recover from the Southern Cross Assurance Co. Ltd. the sum of £2,000 claimed to be due under a policy of reassurance made on the life of one William Henry Evans between the plaintiff and the Australian Group and General Assurance Co. Ltd., a company to whose liabilities the defendant company subsequently succeeded. In the contract of reassurance, which was headed " Whole life reassurance policy with profits," it was recited that the personal statement, application and declaration relating to the original assurance should be the basis of and form part of the contract. It was witnessed also that except as thereinafter provided the Australian Group and General Assurance Co., on production of the contract duly discharged, would on the death of Evans pay to the plaintiff or its assigns the sum of £2,000 sterling. Among the provisos referred to was one that if the above-mentioned documents should be found to be fraudulently untrue in any particular the policy or contract of reassurance should be void and the benefits assured forfeited. The plaintiff by its declaration, in addition to substantially setting forth the terms of

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the policy, averred that it was interested in the life of Evans to the amount assured. The defendant, after putting the plaintiff to the proof of the agreement, raised certain defences based on a contention that the contract of reassurance was merely a contract of indemnity; and pleaded further that certain answers made by Evans in his personal statement, which was made a basic part of the contract of reassurance, were untrue and failed to disclose certain material facts relating to various consultations he had had with his medical advisers, and thus were made by Evans falsely and fraudulently to induce the plaintiff to execute and issue to him the policy of life assurance. The defendant relied also upon the failure of the plaintiff to notify the defendant that Evans had refused to submit himself to further medical examination at an early stage of the original assurance. At the hearing before *Jordan* C.J. the plaintiff put in evidence the policy of reassurance, and the documents mentioned therein, together with two original policies and certain letters, and thereupon closed its case. The defendant applied for a nonsuit substantially upon the ground that the contract, being a contract of reassurance, was one of indemnity merely, and that the plaintiff had failed to prove that it had sustained a loss against which it had to be indemnified. The application was refused. At the close of the defendant's case questions substantially as follows were left for the determination of the jury:—(*a*) Did Evans make any statement in the documents which he submitted to the plaintiff which was fraudulently untrue? (*b*) Did Evans make any untrue statement in those documents? and (*c*) Did the plaintiff fail to make a fair disclosure to the reassuring company of the fact that Evans had declined to be re-examined? The questions were answered in the negative. A verdict was entered for the plaintiff in the sum of £2,000. An appeal by the defendant to the Full Court of the Supreme Court was dismissed: *Southern Cross Assurance Co. Ltd.* v. *Australian Provincial Assurance Association Ltd.* (1).

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

Further material facts appear in the judgments hereunder.

(1) (1935) 35 S.R. (N.S.W.) 193; 52 W.N. (N.S.W.) 49.

Mason K.C. (with him *Herron* and *Keegan*), for the appellant. On the fair construction of question 10 in the personal statement, the proponent, the deceased, was required to state particulars of all consultations he had had with doctors during the previous ten years. This he did not do. A similar position was dealt with by the Privy Council in *Mutual Life Insurance Co. of New York* v. *Ontario Metal Products Co.* (1).

[DIXON J. referred to *Saunders* v. *Queensland Insurance Co.* (2).]

For the purpose of the statement every disorder concerning which the proponent consulted a doctor was an illness, and he should have furnished full details of every such instance. The materiality of the questions and the nature and extent of his illnesses were not, in respect of his application, matters for the proponent (*Guardian Assurance Co.* v. *Condogianis* (3); *Condogianis* v. *Guardian Assurance Co.* (4)). Those matters, however, were very material to the company. If there was any untrue statement on the part of the proponent, the claim must fail. The contract is one of reassurance, so that unless the reinsured suffered damage under the policy it cannot recover. A contract of reassurance by itself means a reassuring of the risk involved. A contract of reassurance, as here, is a contract of indemnity. The appellant is liable only to the extent of the respondent's liability. The remarks of the Privy Council in *Australian Widows' Fund Life Assurance Society Ltd.* v. *National Mutual Life Association of Australasia Ltd.* (5) are not applicable here. The distinction there is between an independent contract of assurance and a contract of indemnity. The principles which should be applied are as stated in *Australian Provincial Assurance Association Ltd.* v. *Producers and Citizens Co-operative Assurance Co. of Australia* (6). The question whether a contract of reassurance and a contract of assurance are in different categories was not raised in *Dalby* v. *India and London Life Assurance Co.* (7).

[EVATT J. referred to *Norwich Union Fire Insurance Society* v. *Colonial Mutual Fire Insurance Co.* (8).]

(1) (1925) A.C. 344.
(2) (1931) 45 C.L.R. 557.
(3) (1919) 26 C.L.R. 231.
(4) (1921) 2 A.C. 125; 29 C.L.R. 341.
(5) (1914) A.C. 634, at p. 641.
(6) (1932) 48 C.L.R. 341, at pp. 363, 364.
(7) (1854) 15 C.B. 365; 139 E.R. 465.
(8) (1922) 2 K.B. 461.

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The questions of reinsurance and indemnity were discussed in *Re Athenæum Life Assurance Society*; *Ex parte Prince of Wales Life Assurance Society* (1); *Joyce* v. *Realm Marine Insurance Co.* (2); *Mutual Safety Insurance Co.* v. *Hone* (3); *Porter's Laws of Insurance*, 8th ed. (1933), pp. 262 et seq.; *Welford and Otter-Barry* on *Fire Insurance*, 3rd ed. (1932), pp. 382 et seq.; see also *Australian Widows' Fund Life Assurance Society Ltd.* v. *National Mutual Life Association of Australasia Ltd.* (4).

E. M. Mitchell K.C. (with him *Gain*), for the respondent. If a person reinsured has at the date of the reassurance an insurable interest up to the amount reinsured, that suffices to make the contract legal; thereafter the rights of the parties depend upon the proper construction of the contract of reassurance. Upon the proper construction of the contract now under consideration the respondent is entitled to recover £2,000 upon death, except so far as the appellant can by way of defence establish non-liability under the reassurance contract in whole or in part. The question whether the proponent had sufficiently or properly answered question 10 in his personal statement was one of fact rightly left to the jury and determined by them. The consultations between the proponent and his medical adviser subsequent to 15th October 1927 were not required to be disclosed as a condition of the validity of the substituted policy. The declaration by the proponent was not as to the absolute accuracy of the information furnished by him, but only that it was true to the best of his knowledge and belief (*Maye* v. *Colonial Mutual Life Assurance Society Ltd.* (5)). The position in law is that a contract of reassurance upon a life may or may not be a contract of indemnity; whether it is so or not depends upon the terms of the contract itself (*Australian Widows' Fund Life Assurance Society Ltd.* v. *National Mutual Life Association of Australasia Ltd.* (6); see also *Dalby* v. *India and London Life Assurance Co.* (7) and *Law* v. *London Indisputable Life Policy Co.* (8)). "Insurable

(1) (1859) Johns. 633, at p. 643; 70 E.R. 573, at p. 577.
(2) (1872) L.R. 7 Q.B. 580.
(3) (1849) 2 N.Y. 235, at p. 239.
(4) (1912) 14 C.L.R. 141.
(5) (1924) 35 C.L.R. 14.
(6) (1912) 14 C.L.R., at pp. 146, 147, 151, 165, 177; (1914) A.C., at pp. 640, 641.
(7) (1854) 15 C.B. 365; 139 E.R. 465.
(8) (1855) 1 K. & J. 223; 69 E.R. 439.

interest" was dealt with in *Boehm* v. *Bell* (1). *Re Athenæum Life Assurance Society*; *Ex parte Prince of Wales Life Assurance Society* (2) is clearly distinguishable. The passage based upon that case which appeared in the seventh edition (1925) of *Porter's Laws of Insurance*, p. 270, has been modified in the eighth edition of that work. *Dalby* v. *India and London Life Assurance Co.* (3) shows that it is sufficient if there is an insurable interest at the date of the contract of reassurance. It is admitted on the pleadings that there was an insurable interest at that date. The answer furnished by the proponent to question 10 was in accord with a fair and reasonable construction of that question (*Condogianis* v. *Guardian Assurance Co.* (4)). A question of this nature should be construed in a fair and common sense way (*Connecticut Mutual Life Insurance Co. of Hertford* v. *Moore* (5)). That case shows also that it is too late to raise on an appeal a question of misdirection unless objection was taken at the time of the summing up (6).

Mason K.C., in reply. *Maye* v. *Colonial Mutual Life Assurance Society Ltd.* (7) has no application to this case, which is one of reassurance. This is a contract of indemnity only. Were it otherwise, the possibility of profit would be a gamble of a nature prohibited by statute.

Cur. adv. vult.

The following written judgments were delivered:— Aug. 8.

RICH, DIXON, EVATT AND MCTIERNAN JJ. This is an appeal from an order of the Full Court of the Supreme Court of New South Wales refusing an application made by the appellant company to enter a verdict for the defendant or for a new trial. The action was brought against it by the respondent company upon a policy of reinsurance. The trial took place before *Jordan* C.J. and the jury returned a verdict for the plaintiff for the full amount of the policy, viz., £2,000.

By a policy, dated 1st July 1928, the respondent company insured the life of one, Evans, for this sum. The policy was issued in

(1) (1799) 8 T.R. 154; 101 E.R. 1318.
(2) (1859) Johns. 633; 70 E.R. 573.
(3) (1854) 15 C.B. 365; 139 E.R. 465.
(4) (1921) 2 A.C., at p. 130.
(5) (1881) 6 App. Cas. 644, at p. 650.
(6) (1881) 6 App. Cas., at p. 654.
(7) (1924) 35 C.L.R. 14.

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substitution for a policy upon the same life for £4,000 granted on 15th October 1927 under which the risk commenced on 1st October 1927. By an indorsement, it was provided that for all purposes the policy should be deemed to be dated 1st October 1927 and that it was issued in lieu of the prior policy which was thereby cancelled. The reinsurance was arranged by the respondent company by letters dated 7th and 9th May 1928. The arrangement was made, not with the appellant company itself, but with a company to whose liabilities the appellant company has since succeeded. It is convenient to speak of this company as the reinsurer. The formal proposal for the reinsurance was made by the respondent company to the reinsurer on 25th June 1928. The policy of reinsurance sued upon was dated 2nd August 1928, but it recited that the premium had been paid for an insurance for twelve calendar months from 1st October 1927 and that the like sum was to be paid on 1st October in each succeeding year during the life assured. The policy of reinsurance was kept up until the death of Evans, which occurred on 4th December 1931. In the recitals the policy sued upon stated that the respondent company had made an application for reassurance, but the obligation of the policy was not expressed as a mere indemnity to the respondent company ; it was expressed as a simple obligation to pay the sum of £2,000 on the death of Evans. By the recital, the personal statement, application and declaration of Evans relating to the original or primary insurance were made the basis of and part of the contract of reinsurance. The declaration of the respondent company was framed upon the assumption that actual payment of any amount under the primary policy of assurance on Evans' life formed no necessary part of its cause of action. It alleged the terms of the policy, the fulfilment of conditions precedent and the death of Evans. The appellant company's defence rested, in substance, upon three grounds. In the first place, it maintained that payment of the claim under the primary policy was essential to the cause of action, or, if actual payment was not essential, it must at least appear that, upon the death of Evans, the respondent company actually incurred a legal liability under the primary insurance to pay such a claim. The appellant company offered evidence, which, however, was not received, to prove that the respondent company had repudiated its liability under the primary policy and had made an *ex gratia* payment of a much less sum than the full amount of the policy. The

second ground of defence was that the policy of reinsurance was not binding because the personal statement of Evans contained misstatements. The third ground was that, when the respondent company effected the reinsurance, it failed to make a sufficient disclosure to the reinsurer of material facts. The jury found the facts against the appellant company in relation to the second and third grounds, but the respondent company contends that, in respect of the second ground, their verdict cannot be supported. It is convenient to deal with these matters before considering the first ground, which depends entirely on questions of law and of interpretation.

Evans' proposal for the insurance of £4,000 was dated 1st October 1927. His personal statement, dated the same day, which was taken by the respondent company's medical officer, contained the usual question whether he had been deferred or declined by any other office. He had submitted himself for medical examination in another office, but he had made no proposal because he received information that, if he did, he would be deferred owing to the discovery of sugar in his urine. The respondent company's medical officer discovered no sugar in his urine. Some discussion must have taken place between him and Evans as to how the question should be answered, because he at first wrote down "Yes" and then scored it out and wrote "No." Before the reinsurance was effected the facts were learned and they were disclosed to the reinsurer. The actual incorrectness of the answer "No" to the question is not relied upon by the appellant company, but the facts are important for a proper understanding of the circumstances in which the reinsurance was effected. The question and answer in the personal statement which are relied upon as untrue or incorrect are as follows :—

10. (A) Have you undergone any surgical operation or suffered from any serious illness or accident ? .. .. .. Typhoid 40 yrs. ago

(B) Have you consulted any doctor during the last ten years ? Yes.

If so, give details hereunder :—

Nature of Operation, Illness or Accident.	Date.	Duration.	Result.	Name of Doctor and Address.
1.				
2. Influenza	2 yrs. ago			Dr. Cecil Tucker
3.				Brighton
4.				

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Dr. Tucker, who is mentioned in the answer, was the family physician of Evans; he had had occasion during the period of ten years often to attend members of his household, and knew Evans' habits and his medical history. The allegation that the answer to the question was not in accordance with fact depends upon four or five incidents. On 24th July 1918 Evans called at Dr. Tucker's surgery and complained that for three weeks he had had a pain in his right groin following, as he thought, a chill. A thorough examination was made but nothing was discovered of any significance, and Dr. Tucker merely prescribed a laxative pill. Evans did not consult him again until 28th February 1920, when he attended his surgery and complained of an inflamed toe. This was put down as probably gout and a remedy was prescribed. Evans next consulted Dr. Tucker on 26th August 1924, when he complained of fullness at the pit of the stomach. He was again examined with some thoroughness, but nothing was found to account for it and simple digestive remedies were prescribed. Dr. Tucker was next consulted by Evans on 12th August 1926. He then complained of a headache. This time an examination disclosed an irregularity in the action of his heart. This Dr. Tucker considered as possibly important. Besides prescribing remedies for digestion and liver, he questioned him as to the extent of his smoking and reduced his allowance of tobacco and tea. He saw him a fortnight later and found that the cardiac arrhythmia had disappeared. Dr. Tucker concluded that it had been due to too much smoking and that his heart was not unsound. He did not restrict his activities in any way. He was unable to say whether he informed Evans that he had found any irregularity of his heart. He was not consulted by him again prior to Evans' proposal of 1st October 1927 to the respondent company. After that proposal, in the absence of Dr. Tucker, Evans did consult his partner, Dr. Lind. He did so on 12th January 1928. He complained of feeling unfit, sweating at night, and losing weight and of some catarrhal infection of the throat. Dr. Lind made an examination then and five days later. Evans' heart displayed a slight irregularity, the muscle sounds were poor; there were no bruits. Dr. Lind thought that there were indications of myocarditis, and he had some discussion with Evans and his wife. In the meantime, the respondent company

learned that Evans had previously been examined with a view to insurance in another company and that, because of the discovery of sugar, he had been informed he would be deferred if he proposed. At or near the beginning of February 1928, the respondent company sought to have another medical examination of Evans made, but it received the answer that Evans was making a business trip abroad. At first the respondent company informed him that "they were not on the risk in view of the information withheld" but, on 28th March 1928, the respondent company wrote to him requesting that he submit himself to a medical examination. In response he called at the office, but he appeared unwilling to comply; he said that he would give an answer in a few days time. On 13th April 1928, he wrote saying that, at the time of insurance, he had given full informa- and was not prepared to submit himself again; if the company was unwilling to go on with the business, he requested a return of his premium. The respondent company, in reply, suggested a report from Evans' own physician. Evans expressed his willingness to accede to this course, but said that Dr. Tucker was abroad.

When the insurance had been effected in October 1927, another company had undertaken, by way of reinsurance, half the risk, namely, £2,000, but it now expressed its unwillingness to continue that risk. The respondent company opened negotiations with Evans to reduce the insurance to £2,000. At the same time, on 7th May 1928, it proposed for reinsurance for this amount with the reinsurer to whose liabilities the appellant company has now succeeded. It informed the reinsurer of the facts relating to the deferring of Evans' life, stating that its medical officer was emphatic that when he examined Evans there was no sugar in his urine. But on the subject of the request for a further medical examination, the respondent company merely wrote:—"In the circumstances we endeavoured to have the policy holder examined by our own chief medical officer . . . but we have not been successful in this direction." The reinsurer replied on 9th May that it would accept £2,000 of the risk. On 30th May the respondent company again communicated with Evans and asked him whether he would be prepared to accept in place of the policy issued a cover for £2,000. To this he consented. He did not sign a fresh proposal, but, as

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already stated, a new policy dated 1st July 1928 was issued to him. The proposal for reinsurance, dated 25th June 1928, although not very clear on the matter, appears to have been read by all the parties as meaning that the respondent company handed over the whole of its risk by reinsuring for £2,000.

Upon these facts the jury must be taken to have found that Evans' answer to the tenth question in the original personal statement was not incorrect, and that the disclosure by the respondent company to the reinsurer upon the question of Evans' unwillingness to submit himself to a fresh medical examination was sufficient. The respondent company exhibited an evident dislike of the risk and a desire to continue the insurance at the reduced amount only, and to do so at the expense of another company reinsuring the full amount. Perhaps this suggests a probability that the information of the reinsured and the reinsurer was unequal. But on the question of non-disclosure, the notice of motion in the Full Court contains no grounds specifically attacking the jury's finding. It was not contended before *Jordan* C.J. that the appellant company was entitled on this ground to a verdict as a matter of law. The question, although apparently raised in the Full Court, is not dealt with at length in the judgments. The notice of appeal to this Court does not specifically raise it, and it was not one of the matters specified by counsel in support of the appeal. In these circumstances, the correctness of the jury's verdict on the issue of non-disclosure by the respondent company to the reinsurer cannot be considered to be raised. Further, it may be remarked that, apart altogether from the question whether the written disclosure sufficed, no evidence was given by the respondent company negativing disclosure by oral communication between the parties.

The question whether the jury was at liberty to find for the respondent company on the issue of the correctness of Evans' answer to the tenth question in his personal statement presents more difficulties. The substance of the direction given by *Jordan* C.J. to the jury as to the meaning of the question was that it required a statement from the proponent of the name or names of the doctor or doctors whom he had consulted for causes which would be properly described as operations, illnesses or accidents, and of the nature, date,

duration and result thereof. This direction appears correctly to state the effect of the question " (B) Have you consulted any doctor during the last ten years ? " and of the table thereunder. It is reasonably clear that the table does not relate to question A, or, at any rate, would not be so read by a proponent. The column headed " Name of Doctor and Address " connects it with question B, and the reference to ten years in that question is scarcely consistent with an inquiry for the names and addresses of doctors who, throughout the proponent's lifetime, have attended him for operations, serious illnesses or accidents.

The words " if so " attached as they are to the question " Have you consulted any doctor ? " show that the details required in answer to question B are those set out in the table. The table itself clearly inquires after information concerning operations, illnesses or accidents and the name and address of the medical attendants concerned therein. The matter is not free from difficulty, but this appears to be the most reasonable meaning to attach to the question. No doubt strict accuracy is required in answering such questions, but where the question may be fairly read by the proponent as requiring information which he might reasonably supply and which might be fairly regarded as helpful to the company, the Court ought not to ascribe to the question a meaning which imposes upon the proponent the oppressive duty of accurately cataloguing every occasion when he has consulted a medical man for any cause whatever throughout ten years. In *Condogianis* v. *Guardian Assurance Co.* (1) the Privy Council was of opinion that the particular question there considered could not reasonably be understood in the sense in which the assured claimed that he had read it. Lord *Shaw of Dunfermline* stated the issue in what he described as " a just and sound form." That form was : " Could a man making a proposal for insurance fairly read the question as applying only to a single previous claim ? " Their Lordships were of opinion that to do so " would result, not in the disclosure which was truly required, but in a failure to reveal essential elements important to be known " (2).

In the present case the insured could fairly read the question as limited to medical attention for operations, illnesses and accidents,

(1) (1921) 2 A.C., at p. 132.

(2) (1921) 2 A.C., at pp. 132, 133.

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and to do so would not lead to a failure to disclose any names the knowledge of which was important or material.

Upon the question whether the jury were at liberty to find that the consultation with Dr. Tucker did not relate to illnesses there can be little doubt. Both Dr. Tucker and Evans regarded the occasion of each of these consultations as a passing ailment. The consultation with Dr. Lind revealed matters of more importance. But this took place after the question was answered. It was said that the personal statement was repeated and brought up to date, so to speak, by the form of Evans' acknowledgment of the receipt of the policy dated 1st July 1928. That contention cannot be supported, for two reasons. In the first place, the policy was issued before Evans gave the acknowledgment. As between him and the respondent company, it might be treated as a collateral contract, although this involves difficulties, but it could not be considered part of the personal statement incorporated in the main contract of primary insurance. In the second place, it forms no part of Evans' personal statement, which is made the basis of the contract of reinsurance.

It is desirable to state that the invalidity or voidability of the contract of primary insurance is not a matter with which this case is concerned. The respondent company's insurable interest was not put in issue. It is possible, as will appear from the discussion of the first ground of defence, that the non-existence of the primary liability might be fatal to the reinsurance on the ground of lack of insurable interest. But upon this matter a difference of opinion arose in this Court in *Australian Widows' Fund Life Assurance Society Ltd.* v. *National Mutual Life Association of Australasia Ltd.* (1).

For these reasons the appeal cannot succeed upon the second or third ground of defence stated above.

The first ground of defence raises the question whether, in point of law, a reinsurance upon life, or, at any rate, this particular reinsurance, must be considered a contract to indemnify the reinsured against liability under the primary policy and no more. This question necessitates some examination of the principles of

(1) (1912) 14 C.L.R. 141.

common law and equity and the provisions of statute which determine the nature assumed by a contract of reinsurance.

In the Court of Chancery early in the eighteenth century a tendency appeared to regard all insurance as necessarily limited to indemnification of a loss actually suffered. There is some reason to think that this view was founded upon more than a presumptive interpretation of the contract of insurance, and that the Court would have been prepared to lay it down as a rule of law or equity. (Cf. *Sadlers' Co.* v. *Badcock* (1); *Goddart* v. *Garrett* (2); *Harman* v. *Vanhatton* (3).) The Courts of common law, which treated gaming contracts as valid and enforceable, could not without some inconsistency adopt this view except upon the ground that the insurance of a particular risk or event had a tendency which the policy of the law could not allow. In *Cousins* v. *Nantes* (4) counsel referred to *Goddart* v. *Garrett* (2), and said that it showed that though a policy without interest was a contract to which the law would give effect, it was one which the Courts of equity would not permit to be enforced. Thereupon Sir *James Mansfield* C.J. said: "The Courts of equity formerly exercised an odd jurisdiction upon this subject; but they could not have proceeded upon the ground that an agreement was good on one side of Westminster-hall, and not on the other." In the course of the judgment he said: "Wager policies at last came to be legal, nobody knows how, contrary to common sense" (5). But it appears probable that the doctrine which the Courts of Chancery favoured provides the basis of the rule which became completely established, that contracts of fire insurance cannot be anything but contracts of indemnity. (See *Welford and Otter-Barry's Fire Insurance*, 2nd ed. (1921), p. 302, ch. 20, sec. 4, particularly sub-sec. 2). But, apart from statute, the rule did not prevail in life and marine insurance. In *Connecticut Mutual Life Insurance Co.* v. *Schaefer* (6), *Bradley* J., delivering the judgment of the Supreme Court of the United States, said:—"It is generally agreed that mere wager policies—that is, policies in which the insured

(1) (1743) 2 Atk. 554, at pp. 556, 557; 26 E.R. 733, at p. 734.
(2) (1692) 2 Vern. 269; 23 E.R. 774.
(3) (1716) 2 Vern. 717; 23 E.R. 1071.
(4) (1811) 3 Taunt. 513, at p. 517; 128 E.R. 203, at p. 205.
(5) (1811) 3 Taunt., at p. 522; 128 E.R., at p. 207.
(6) (1876) 94 U.S. 457, at p. 460; 24 Law. Ed. 251, at p. 253.

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party has no interest whatever in the matter insured, but only an interest in its loss or destruction—are void, as against public policy. This was the law of England prior to the Revolution of 1688. But after that period, a course of decisions grew up sustaining wager policies. The Legislature finally interposed, and prohibited such insurance : first, with regard to marine risks, by statute of 19 Geo. II. c. 37 ; and next, with regard to lives, by the statute of 14 Geo. III. c. 48."

The statute 14 Geo. III. c. 48, the *Life Assurance Act* 1774, more commonly called the " Gambling Act," provides in reference to life insurance against insurance without interest and against recovery of more than the interest insured. But the Courts of common law, in construing the statute and in applying it, have treated it as doing no more than prescribing to what extent contracts previously allowed by law shall be efficacious. They have proceeded from the position stated by Lord *Mansfield* in *Da Costa* v. *Jones* (1) :— " Indifferent wagers upon indifferent matters, without interest to either of the parties, are certainly allowed by the law of this country, in so far as they have not been restrained by particular Acts of Parliament : and the restraints imposed in particular cases, support the general rule. For where Parliament interposes and says, ' Unless you have an interest in such a case, any wager or insurance upon it shall be void and of no effect ' ; it implies, that in cases not specially prohibited by Act of Parliament, parties may wager or insure at pleasure."

The limitations imposed by the Act of 1774 are expressed in its first and third sections. The first section provides that no insurance shall be made upon the life or lives of any person or persons or on any other event or events whatsoever wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made shall have no interest, or by way of gaming or wagering ; and every assurance made contrary to the true intent and meaning thereof shall be null and void. Sec. 3 provides that in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers

(1) (1778) 2 Cowp. 729, at pp. 734, 735 ; 98 E.R. 1331, at p. 1334.

than the amount or value of the interest of the insured in such life or lives, or other event or events.

A construction was at one time given to these provisions from which it necessarily resulted that a contract of insurance on the life of a third person should amount to a contract of indemnity. It was decided in the Court of King's Bench presided over by Lord *Ellenborough* that no more could be recovered than the loss which the insured suffered by the dropping of the life (*Godsall* v. *Boldero* (1)). Of this case, Lord *Blackburn* said in *Burnand* v. *Rodocanachi* (2):—"Lord *Ellenborough* falling into a blunder which has since been corrected thought that the contract of life assurance was a contract of indemnity, and accordingly held that that was a good defence on the part of the insurance company. I have been told by people connected with insurance companies and other people with whom I have been brought into contact in the course of my professional experience, that no sooner had that been done than there was such an outcry that everyone said he would never insure with a company which was capable of doing such a shabby thing. Consequently the insurance company instantly paid the whole loss and the whole of the costs, and published everywhere that they had done so. Nevertheless Lord *Ellenborough's* decision stood until it was decided in the Exchequer Chamber that that case went altogether upon a mistaken idea that a contract of life insurance was a contract of indemnity, whereas it was nothing of the sort." The case in the Exchequer Chamber which overruled *Godsall* v. *Boldero* (1) is *Dalby* v. *India and London Life Assurance Co.* (3). The third section of the statute was given a construction by which the word "hath" was read as referring to the time of effecting the policy. Thus the insured must at the time of obtaining the insurance have an interest in the life. When death occurs, he can recover the full amount of that interest and no more. Events which occur after the insurance cannot diminish the amount which he is entitled to recover. "Thus, the liability of the assurer becomes constant and uniform, to pay an unvarying sum on the death of the *cestui que vie*, in consideration of an unvarying and uniform premium paid

(1) (1807) 9 East 72; 103 E.R. 500.
(2) (1882) 7 App. Cas. 333, at pp. 340, 341.
(3) (1854) 15 C.B. 365; 139 E.R. 465.

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by the assured. The bargain is fixed as to the amount on both sides" (per *Parke* B. (1)).

In *Law* v. *London Indisputable Life Policy Co.* (2) Sir *W. Page Wood* V.C. said of this case :—" The decision in the Exchequer Chamber, independently of the high authority of that Court, appears to me to rest upon a right footing as to policies of this description. Policies of insurance against fire or marine risk are contracts to recoup the loss which the parties may sustain from particular causes. When such loss is made good *aliunde*, the companies are not liable for a loss which has not occurred ; but in a life policy there is no such provision. The policy never refers to the reason for effecting it. It is simply a contract that, in consideration of a certain annual payment, the company will pay at a future time a fixed sum, calculated by them with reference to the value of the premiums which are to be paid, in order to purchase the postponed payment. Whatever event may happen meanwhile, is a matter of indifference to the company. They do not found their calculations upon that, but simply upon the probabilities of human life, and they get paid the full value of that calculation. On what principle can it be said that, if some one else satisfies the risk, on account of which the policy may have been effected, the company should be released from their contract ? The company would be in the same position whether the object of the insured were accomplished or not ; whether he were in a better or worse position, that could have no effect upon the contract with the company, which was simply calculated upon the value of the life which they had to insure. The Exchequer Chamber came to this conclusion in the case of an insurance upon the whole term of a life, where the person insured had received the amount, to provide against the loss of which his insurance was affected."

These principles govern reinsurance for life as well as original insurance. There is no rule of law which prevents the making or controls the effect of a reinsurance contract enabling the reinsured to recover the full amount of the risk reinsured, although in the meantime before the life has dropped, liability upon the

(1) (1854) 15 C.B., at p. 389 ; 139 E.R., at p. 475.

(2) (1855) 1 K. & J., at pp. 228, 229 ; 69 E.R., at pp. 441, 442.

policy of original insurance has ceased. The law imposes one restriction only upon the contract of life insurance which the parties may make. It imposes another restriction upon the amount which the insured may recover upon that contract. The parties may not contract for the insurance of a life, whether the insurance be primary or purport to be by way of reinsurance, unless the insured or the reinsured is so situated that, if the life fell, he would suffer a material loss, in other words, unless he has an insurable interest in the life. This requirement is satisfied by the existence at the time when a reinsurance is effected of a primary insurance under which the reinsurer is liable as insurer. We are not called upon to consider the case which has been supposed of a primary insurance which covers the risk of death from certain causes only, and a reinsurance which covers death from all causes. But it may be suggested that, in such a case, death from causes outside those covered by the primary insurance is a risk against which the primary insurer cannot validly reinsure; that he has no insurable interest therein. When, however, a reinsurance has once been validly effected because it is based upon an insurable interest consisting in liability under the primary insurance, then, subject always to the conditions of the contract, the law enables the reinsured to recover the value of his original interest when death occurs, notwithstanding that in the meantime it may have been terminated by the lapse of the primary insurance or reduced in amount by some variation of the contract constituting the primary insurance. Thus, the parties to a contract of reinsurance are at liberty to frame it, if they choose, as a promise to pay any sum not exceeding the sum for which at the time of reinsurance the reinsured was at risk under the primary insurance, and, if they so frame it, that sum remains recoverable on death occurring, whatever at that time may be the liability of the reinsured under the primary insurance and whatever settlement may be accepted of the claim under the primary insurance. On the other hand, the contract of reinsurance may be framed to give nothing but an indemnification of the actual pecuniary loss incurred by the reinsurer under the primary insurance through the death of the life insured. In fact, the terms and conditions of the contract of reinsurance may be

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any the parties choose to adopt if they are consistent with the requirement that, at the time of the reinsurance, an insurable interest shall exist and with the limitation of the amount recoverable to the value of that interest. The question, what is the character of the reinsurance, must always depend upon the intention of the parties and, therefore, be a question of interpretation. The contract must be interpreted like any other contract, and the natural meaning of the language used must receive its effect unless, upon a proper application of the rules of interpretation, a contrary intention is found to be contained within the instrument. Preconceptions as to what the transaction involves of its own nature, or what the parties are likely to have intended ought not to be allowed to deprive the language in which the reinsurance is expressed of its natural meaning and effect.

In the present case, the policy of reinsurance expresses unambiguously a promise on the part of the reinsurer to pay to the reinsured a sum certain on death occurring. The policy is expressed to witness that, except as thereinafter provided, the reinsurer would on the death of the life assured pay to the assured, that is, the reinsured, the sum of £2,000. It is true that the recital speaks of the transaction as a reassurance. Further, there are two indorsements upon the policy. One relates to benefits payable upon sickness and certain events other than death; the second relates to bonuses under the primary insurance. Each of these indorsements is framed to provide the reinsured with an indemnity and nothing but an indemnity against the liability for the benefits and bonuses respectively. But the description reassurance and the existence of these two clauses of indemnity does not supply sufficient ground for implying a restrictive meaning of the language expressing a promise to pay a sum certain when and if death occurs. The language does not make payment depend on any further contingency. There is nothing in the description reassurance that is inconsistent with the full operation of the absolute promise to pay on death simpliciter. A contract of reinsurance is not necessarily an indemnity only. The indorsements express separate obligations in reference to events unconnected with the main risk insured; the fact that they are expressed as indemnities supplies no reason for attempting to mould the main

promise so as to conform to their nature. It follows that, according to the tenor of the obligation contained in the policy of reinsurance, the reinsurer remains liable to pay the amount reinsured notwithstanding that the reinsured may have paid under the primary insurance less than that amount or nothing at all.

Neither the pleadings nor the facts raise the question already referred to, whether, if the policy of primary insurance is at the time of the reinsurance voidable at the option of the insurer, he possesses an insurable interest sufficient to support the contract of reinsurance, and nothing that has been said in this judgment is intended to affect it.

The appeal should be dismissed with costs.

STARKE J. The Australian Provincial Assurance Association Ltd. (hereinafter referred to as A.P.A.) issued a policy of life assurance for £2,000 to William Henry Evans upon his own life, but for the benefit of his widow. It is dated 1st July 1928, but an indorsement on the policy provides that it shall for all purposes be deemed to be dated 1st October 1927. It recited a proposal and declaration, and stipulated that if any material information should have been withheld or omitted therefrom or from the documents referred to therein or if any material misrepresentation should have been made in the proposal and declaration and other documents, then the policy should be null and void and all premiums paid thereon should be forfeited to the A.P.A. The premium was £94 15s., payable yearly. The assured was entitled to participate in the profits of the A.P.A., and to certain payments in the event of disability. The A.P.A. effected a reassurance on the life of William Henry Evans with the Australian Group and General Assurance Co. Ltd. (hereinafter referred to as the Group Co.). The policy of reassurance is dated 2nd August 1928. It recites that the A.P.A. had made an application to the Group Co. for a reassurance on the life of Evans, and had lodged copies of personal statement, application, and declaration relating to the original assurance, all of which were declared to be the basis of and to form part of the contract. The policy provided that, except as thereinafter stipulated, the Group Co., on production of the policy duly discharged, would on the

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death of Evans pay to the assured or its assigns the sum of £2,000. The premium was the same as under the original policy, and indorsements on the policy covered profits and disability benefits assured under the original policy to the same extent. One of the terms of the policy was that if the premium were not duly paid or if the documents should be found to be fraudulently untrue in any particular, then and in any such case the policy would be void, and the benefits assured should be forfeited, and premiums paid should be forfeited to the Group Co. It is admitted that the Southern Cross Assurance Co. Ltd. (hereinafter referred to as the Southern Cross)—the appellant here—"agreed to be liable in respect of the said policy of reassurance in respect of all claims arising out of the said policy of reassurance," and that the A.P.A. "abandoned all claims against the Group Co. in respect of the said policy of reassurance." Evans died on or about 5th December 1931.

The A.P.A. brought an action in the Supreme Court of New South Wales against the Southern Cross upon the policy of reassurance. It was tried before the learned Chief Justice of that Court and a jury. The A.P.A. proved the policy, the death of Evans, and that all premiums under the policy had been paid. Whereupon counsel for the Southern Cross moved for a nonsuit: it was contended that the policy of reassurance was a contract of indemnity, and that its object was to procure for the assured indemnity for any loss sustained by reason of the death of Evans. The nonsuit was refused. Later the Southern Cross endeavoured to prove some settlement between the A.P.A. and those representing Evans or his estate, but the evidence was rejected on the ground that the document tendered was a privileged communication between solicitor and client, and, if that were wrong, then upon the ground that the evidence was irrelevant. In the result, a verdict was entered for the A.P.A. upon the policy; the Southern Cross unsuccessfully appealed to the Supreme Court of New South Wales, and has now brought an appeal to this Court from the judgment of that Court.

Life assurance has a long legal history (see *Holdsworth, History of English Law*, vol. VIII., p. 285; *Macgillivray, Insurance Law*, (1912), pp. 103-106, 109-113). But it is quite unnecessary to traverse

that history. The case of *Dalby* v. *India and London Life Assurance Co.* (1) authoritatively described the nature of the contract and the effect upon it of the *Life Assurance Act* 1774 (14 Geo. III. c. 48). The contract of life assurance, of course, enables the assured to make provision against death or loss of faculties. But it differs from insurances against risks to property. Insurances against risks to property are contracts to indemnify the insured against loss; life assurance, on the other hand, is not ordinarily a contract to indemnify the assured against losses but an engagement to pay a certain sum of money on the happening of a certain event, in consideration of payment of premiums in the meanwhile (*Law* v. *London Indisputable Life Policy Co.* (2); *Rankin* v. *Potter* (3), per *Blackburn* J.; *Gould* v. *Curtis* (4); *Connecticut Mutual Life Insurance Co.* v. *Schaefer* (5)). "No doubt a contract to indemnify against loss consequent upon the death of an individual may be made, but a life policy taken out on the life of another is not to be construed as a contract of indemnity unless the intention of the parties that it should be so limited is clearly expressed" (*Macgillivray, Insurance Law* (1912), p. 113). The *Life Assurance Act* 1774 (14 Geo. III. c. 48) required an interest in the life at the date of the contract and limited the right to recover on the contract to the amount of the interest at the time of effecting the policy (*Dalby* v. *India and London Life Assurance Co.* (1)). Reinsurance is insurance applied in a particular way to cover, in whole or in part, a risk already assumed: it is "counter" insurance to the risk so assumed. And in a policy of reassurance on life, as in an original life assurance policy, a promise to pay a sum certain upon death "excludes the notion of indemnity as to amount unless there is something else in the contract to qualify it" (*Dalby* v. *India and London Life Assurance Co.* (1); *Australian Widows' Fund Life Assurance Society Ltd.* v. *National Mutual Life Association of Australasia Ltd.* (6); *Australian Provincial Assurance Association Ltd.* v. *Producers and Citizens Co-operative Assurance Co. of Australia* (7)). But it is of course

(1) (1854) 15 C.B. 365; 139 E.R. 465.
(2) (1855) 1 K. & J. 223; 69 E.R. 439.
(3) (1873) L.R. 6 H.L. 83, at p. 119.
(4) (1912) 1 K.B. 635, at p. 641.
(5) (1876) 94 U.S. 457; 24 Law. Ed. 251.
(6) (1912) 14 C.L.R., at p. 166; (1914) A.C., at p. 643.
(7) (1932) 48 C.L.R., at p. 352.

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possible so to express a contract of reassurance on life that the reinsurer's promise is only to pay an indemnity; it depends on the terms of the policy, but the intention of the parties so limiting the liability of the reinsurer should be clearly expressed.

In the present case, the obligations of the insurer and the reinsurer are practically the same, but the policy of reassurance is not expressed as one of indemnity only; the promise is absolute: that the reinsurer will—subject to certain conditions immaterial to the matter under discussion—on the death of the life assured pay to the assured or its assigns the sum of £2,000. It is not a contract of indemnity, but a contract binding the reinsurer to pay a sum certain on the happening of a given event. And the A.P.A. established—indeed, it was not, I think, disputed for the purposes of the nonsuit—that it had an insurable interest in the life of Evans at the time the policy of reassurance was effected. The motion for a nonsuit was therefore rightly refused.

But the Southern Cross also takes other ground. The personal statement, application and declaration made by Evans in relation to the original assurance are, it will be remembered, declared to be the basis and to form part of the contract of reassurance. It is alleged that the personal statement contains statements that are untrue, and did not disclose certain material information. The statement, so far as here relevant, is as follows :—

Question.	Answer.
5. (A) Are you at present in good health ?	Yes.
(B) Have you usually enjoyed good health ?	Yes.
10. (A) Have you undergone any surgical operation or suffered from any serious illness or accident ?	Typhoid 40 yrs. ago.
(B) Have you consulted any doctor during the last ten years ? If so, give details hereunder :—	Yes.

Nature of Operation, Illness or Accident.	Date.	Duration.	Result.	Name of Doctor and Address.
Answer : Influenza	2 yrs. ago			Dr. Cecil Tucker Brighton.

And it was declared " that the statements made herein are, to my knowledge and belief, strictly correct, no material information

having been withheld." The evidence disclosed that Evans consulted Dr. Tucker in 1918, 1920, 1924, and twice in 1926, and also Dr. Lind twice in 1928. In 1926 Dr. Tucker detected irregularity in the heart—arrhythmia—but he did not disclose the fact to Evans, nor in any way restrict his activities. He treated him in 1918 for constipation, in 1920 for an inflamed toe, and in 1924 and 1926 for digestive troubles. Dr. Lind also treated Evans in 1928 for digestive troubles, but regarded his condition lightly, though he suspected myocarditis, from which Evans subsequently died; Dr. Lind, however, did not disclose his suspicion to Evans. It should be observed that the personal statement was made by Evans in October 1927, in connection with a proposal for a policy of £4,000 and before he consulted Dr. Lind. But the personal statement must, I think, be treated, for the purpose of the above-mentioned policy of £2,000 issued to Evans and dated 1st July 1928, as if no change of belief or fact had occurred in the meantime.

Did Evans, then, make an untrue statement in asserting that he was "at present in good health," or had "usually enjoyed good health"? The just construction of the fifth question and answer is that Evans was not conscious of any loss of faculties or functions, or of ailments or symptoms affecting his vitality, not that it is an assertion of the soundness of his constitution. (See *Thomson* v. *Weems* (1).) It is impossible, on the evidence adduced in this case, to disturb the finding of the jury that Evans' statement as to his health, thus construed, was not untrue.

The other question and answer referred to remain for consideration. The details required under the question apply naturally as well to part A as to part B thereof: indeed their reference to part A is rather more obvious than to part B. But what is the reasonable construction of the question "Have you consulted any doctor during the last ten years? If so, give details." It would not be reasonable to expect a person proposing assurance to recollect and disclose every occasion on which he had consulted a doctor during a past period of ten years, however slight or trivial the ailment, indisposition or injury. Any such view is untenable in the face of the details required by the question: the nature of the operation,

(1) (1884) 9 App. Cas. 671, at pp. 691, 692.

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illness or accident is to be stated, its date, duration, and result, and the name of a doctor. It must depend upon the character or nature of the act, indisposition or injury whether, in the ordinary use of words, the act would be called an operation, the indisposition an illness, or the injury an accident, or whether it is something too trivial and unimportant for any such description. The question is, within reason, a pure question of fact. In the present case, the jury have found that the answer given to the question was not untrue, and, in my opinion, that finding is open upon the evidence adduced, and should not be disturbed (*Connecticut Mutual Life Insurance Co. of Hertford* v. *Moore* (1); *Mutual Life Insurance Co. of New York* v. *Ontario Metal Products Co.* (2)).

In this view, it is unnecessary to consider whether the policy of reassurance was only avoided in the event of a fraudulent statement having been made in the personal statement of Evans. The argument is based upon the proviso, already mentioned, in the reassurance policy. (See *Fowkes* v. *Manchester and London Assurance Association* (3); *Maye* v. *Colonial Mutual Life Assurance Society Ltd.* (4); and compare *Condogianis* v. *Guardian Assurance Co.* (5); *Dawsons Ltd.* v. *Bonnin* (6); *Yorkshire Insurance Co.* v. *Campbell* (7).) This view also disposes of the seventh plea of the Southern Cross; it alleged that the original policy was avoided by reason of the same untrue statements by Evans in his personal statement, whereby, as the plea alleges, the Southern Cross became and was discharged from liability under the policy of reassurance. Another plea, the eighth, alleged that the A.P.A. concealed certain material facts from the Group Co. when making the policy of reassurance. The jury found that a fair disclosure was made. The finding was not challenged on this appeal, and nothing more, therefore, need be said concerning this plea.

The result is that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *A. J. Taylor, William Arnott & Co.*
Solicitors for the respondent, *Allen, Allen & Hemsley.*

J. B.

(1) (1881) 6 App. Cas., at p. 648.
(2) (1925) A.C., at pp. 348, 349.
(3) (1863) 3 B. & S. 917; 122 E.R. 343.
(4) (1924) 35 C.L.R. 14.
(5) (1921) 2 A.C., at p. 130.
(6) (1922) 2 A.C. 413.
(7) (1917) A.C. 218.