1953
*Oct. 15, 16
1954
*Jan. 26

GEORGE WILLIAM ELLIS (*Plaintiff*) ..... APPELLANT;

AND

LONDON-CANADA INSURANCE COMPANY (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Surrender of policy by insured at request of insurer and acceptance of return of full amount of premium—Whether cancellation by mutual agreement or by uni-lateral action of insurer—Application of statutory condition 12(2), The Insurance Act, R.S.O. 1950, c. 183, s. 197.

Where an insured at the request of an insurer surrenders a policy of insurance issued to him by the latter and accepts the return of the full premium, the insured must be taken to have voluntarily agreed to the recission of the contract by mutual agreement. In such a case the insured cannot claim the benefit of Statutory Condition 12(2) (*The Insurance Act,* R.S.O. 1950, s. 197) which applies only to cancellation of a policy by unilateral action on the part of an insurer.

Decision of the Court of Appeal for Ontario, [1953] O.R. 141, affirmed.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of McRuer C.J.H.C. (2) in favour of the plaintiff-appellant.

R. R. McMurty, Q.C. and *O. F. Howe, Q.C.* for the appellant.

T. N. Phelan, Q.C. and *A. T. Hewitt* for the respondent.

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The judgment of the Chief Justice and Rand J. was delivered by:—

RAND J.:—At the outset of this appeal a simple question of fact is raised: did the insured, a man named Gillan, prior to the accident, surrender the insurance policy with the intention that it should thereupon cease to be in force; and on that I entertain no doubt whatever.

The relevant facts are few. Desiring insurance, he requested a soliciting agent, Marshall, to obtain it for him. The first application made was declined; a second, to another company, the respondent, signed for him by Marshall, was accepted and on or about September 6 the policy was issued by an inspector, Alexander, in Ottawa. A few days later, following inquiries, the head office in Toronto through Carmichael intimated to the inspector that the insured was not a desirable risk and that it was felt the policy should be picked up as soon as possible and returned for cancellation. The inspector, on September 14, thereupon wrote to Marshall:—

> I would appreciate if you would please return the above policy for cancellation.

On September 15, Marshall wrote to the insured:—

> I very much regret to inform you that the above company has requested me to return the above policy for cancellation. Kindly forward same to me, and upon receipt of same, I will immediately forward my cheque for the original premium, namely $50.10.

The policy was at once returned as requested, and on the 19th of September it was forwarded to the head office. On September 20, Marshall wrote the insured, acknowledging receipt of the policy and enclosing his cheque for $50.10. The letter concluded with this sentence:—

> Again regretting being unable to place the business for reasons unknown to me.

On the 23rd of September, the insured was involved in a serious motor collision in which the wife of the appellant was killed and the appellant himself injured. In an action against the insured, which the Attorney General defended, judgment was recovered in May, 1951, and in December of that year this action was brought under s. 214 of *The Insurance Act*, R.S.O. 1950, c. 183.

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Rand J.

The contention urged before us is that the word "cancellation" used in the letter of September 15 to Gillan must be taken to refer to Condition 12 which enables the company, on certain terms, to cancel the policy at any time by a 15-days' notice in writing to the insured; that we must conceive the insured as being fully aware of the meaning and significance of the conditions, and that what he meant by "returning the policy" for cancellation was either that it would enable the company in some way, through its possession of the policy, to give the notice, or that he accepted the letter of the 15th as a notice; and that until the expiration of the 15 days the policy was to be deemed, as it was thought by the insured, to be continuing in force.

Apart from the fact that the letter does not either purport to be such a notice or to conform to the requirements of the condition, there are on this point further circumstances that throw some light on the insured's view of what he had done. In June, 1951, he was examined on discovery, and being asked "Have you any contract of insurance at all by the terms of which the insured (insurer?) is liable to pay in whole or part the amount of the judgment" and having answered "no", this followed:—

> No insurance at all of any kind, personal liability, property damage or anything like that?—A. No. It went off Wednesday night and I smashed up Saturday night.
>
> * * *
>
> You say your insurance went off a few days before the date of the accident?—A. Yes: that is right.

The insured, in a subsequent question, made this significant remark: "No, I don't know why the policy was not accepted. It was smart business, on their hand, as it turned out, but I have no idea why it was not accepted."

It is argued that these answers were the result of advice the insured had received from a solicitor. When asked about that, he had answered: "That is right. I don't remember what he exactly said, whether he was in touch with Marshall or not, but he said he was going to look into it and he did apparently." It is admitted that no notice was given either of the accident or of the claim by the insured to the company; and the first intimation by the insured that he "believed" himself to be insured at the time of the accident was in his evidence when called in February, 1952, as a witness at the trial in the present

action. If he had in fact believed the insurance to be continuing, what reason could there have been for raising the question with his solicitor at all or in doing anything else than to give notice to the company? Apparently criminal proceedings were taken against him but that did not prevent him from giving the insurance his attention.

In these circumstances I think it would be simply closing our eyes to the facts to find anything other than that the request was for the surrender of the policy which was complied with, and that, on both sides, it was agreed that the insurance should thereby be ended. There is nothing in *The Insurance Act* to prevent the parties from so agreeing. The condition for cancellation is, as the Chief Justice of Ontario stated, a power given to the insurer to act without regard to the consent of the insured. It may be that the insured did not fully appreciate his rights under the policy, but with that we are not concerned: no attempt was made to set the surrender aside.

I would, therefore, dismiss the appeal with costs.

The judgment of Taschereau, Estey and Locke, JJ. was delivered by:—

TASCHEREAU, J.:—The plaintiff, as administrator and in his personal capacity, recovered judgment in the Supreme Court of Ontario for an amount of $20,962.50, against one Charles Gillan in consequence of a motor-car collision. As this judgment was not satisfied, the plaintiff brought action under *The Insurance Act* (R.S.O. 1950, c. 183, s. 214) against the defendant company which was Gillan's insurer by virtue of a Standard Automobile policy, issued on August 31, 1950, for a period of one year.

The accident happened on the 23rd day of September, 1950, so it would seem that the policy, at the time of the accident, was still in force, but the respondent resisted the claim on the grounds that the policy was void because of fraudulent misrepresentation of the insured, and alternatively that if not void, the policy had been cancelled by the defendant previous to the occurrence of the accident in question.

Chief Justice McRuer of the High Court of Ontario maintained the action for $21,406.86 with interest from the 27th of November, 1951, but the Court of Appeal unanimously reversed this judgment and dismissed the action with costs.

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Taschereau J.

I find it unnecessary to deal with the question of misrepresentation in view of the conclusion to which I have come on the second point, on which, I think, the respondent must succeed. I have no doubt that the appellant voluntarily surrendered his policy and that the insurance contract between the parties was not in force on the date of the accident.

Certain undisputed documents which were produced in the record are sufficient to dispose of this case. On the 13th of September, thirteen days after the policy was issued, and ten days prior to the accident, the head office wrote to its inspector Mr. Alexander of the Ottawa office, asking him, in view of the information they had obtained about Gillan to "pick up" the policy as soon as possible and return it for cancellation. On the 14th of the same month, the Ottawa office wrote to Mr. Marshall, the agent who had obtained the policy for Gillan, to return the policy for cancellation, and the next day Mr. Marshall informed Mr. Gillan that the head office had requested him to return the policy. He also told him that upon receipt of the policy he would remit the amount of the premium paid, namely, $50.10. Gillan then returned the policy to Mr. Marshall who, on the 20th of September, forwarded a cheque in the sum of $50.10, the original amount paid, which was cashed on the 21st. All this correspondence took place before the date of the accident, which was September 23, 1950.

It is the contention of the appellant that, from the wording of *The Insurance Act,* the Legislature as a matter of public policy, when an insurer desires to cancel an insurance contract, imposes an obligation on the insurer to allow the insured fifteen days grace within which to place his insurance elsewhere, if he so desires. It is also contended that the insurer in his policy made express provision for such an agreement, by which the insured would agree to the cancellation of the policy. The provisions of *The Insurance Act* dealing with cancellation by the insurer, are found in s. 197, Statutory Condition (12(2)). These conditions provide in effect that on notice by registered mail to the insured, together with rebate of *pro rata* premium, the policy terminates at the end of fifteen days. If this is so, the policy would have been in force on the date of the accident.

I do not agree with this contention. The Statutory Condition applies in case of unilateral cancellation, but does not prohibit a cancellation of a policy by mutual agreement, and here, this agreement was completed prior to the accident. As the Court of Appeal stated, the respondent was not seeking to cancel the insurance by a unilateral action, but was endeavouring to bring the insurance to an end by an agreement with the insured, returning the full premium, without any compensation for the period during which the policy was in force, subsequent to the 31st day of August, 1950. This was also the interpretation given to the effect of the correspondence exchanged between the parties, as the appellant himself stated that on the night of the accident, which was a Saturday, he was not insured, as the policy had ceased to be in force, on Wednesday the 21st.

If Gillan had refused to comply with the request of the company, which was his indisputable right, the company then could have invoked s. 197, Statutory Condition 12(2), and the policy would have remained in force for fifteen days. But such is not the case. By surrendering the policy and accepting the full premium, Gillan voluntarily agreed to the rescission of the contract, and he cannot claim the benefit of the Statutory Condition. The bilateral agreement entered into dispensed the respondent from taking advantage of the compulsory clause of the statute.

I agree with the conclusions of the Court of Appeal and I would dismiss this appeal with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellant: *Howe, McKenna & Howe.*

Solicitors for the respondent: *Gowling, MacTavish, Osborne & Henderson.*