THE UNION MARINE & GENERAL INSURANCE COMPANY LIMITED (*Defendant*) ..... APPELLANT;

AND

ALEX BODNORCHUK AND STEVE NAWAKOWSKY (*Plaintiffs*) ..... RESPONDENTS.

1958

*Feb. 12, 13
Jun. 3

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Insurance—Termination of policy—Whether policy cancelled by mutual agreement—Conflicting evidence—Inferences from facts.

Insurance—Fire insurance—Statutory conditions—Relief against forfeiture—Failure to give immediate notice of loss—The Saskatchewan Insurance Act, R.S.S. 1953, c. 133, s. 157, stat. con. 15, s. 162.

The respondents, who owned and operated an hotel property, held a policy of fire insurance with the appellant company taken out through its local agent. The policy was for three years, but the premuim was payable in annual instalments. At the end of the first year of this policy they took out a policy with another insurer, and did not pay

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke and Abbott JJ.

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the second instalment of premium on the appellant's policy. A loss by fire occurred and the respondents did not at first notify the appellant, and told both the appellant's general agent and an adjuster sent by the other insurer that the appellant's policy had been cancelled. Two months later, however, they filed proofs of loss with the appellant and, when the claim was rejected, brought an action to recover under the policy. The trial judge held that the policy was still in force at the time of the fire and gave judgment for the respondents. This judgment was affirmed by a majority of the Court of Appeal.

Held (Kerwin C.J. and Abbott J. dissenting): The action must fail. The only reasonable inference from the facts established at the trial was that the appellant's policy had been cancelled by mutual agreement between the respondents and the appellant's local agent. The finding of the Courts below that the policy had not been cancelled was not based upon the credibility of witnesses but rather upon the proper conclusions from the evidence and the inferences to be drawn from the conduct of the parties. In this respect, this Court was in an equally good position as the trial judge and the Court of Appeal.

In view of this finding, it was unnecessary to decide whether the power to relieve against forfeiture under s. 162 of *The Saskatchewan Insurance Act* was wide enough to empower the Court to relieve the insured from the consequences of his failure to give notice in writing of the fire to the insurer forthwith after the loss. If the section did give that power, this was not a case where relief should be given, since the failure to give the notice required by stat. con. 15 was deliberate.

Per Kerwin C.J. and Abbott J., *dissenting*: There was no evidence that warranted a finding that the policy was cancelled by mutual agreement. The words in s. 162 "as to the proof of loss to be given by the insured" should be read as including a failure to give notice of the loss under stat. con. 15, and in the circumstances of this case, relief should be given under that section.

Courts—Jurisdiction in appeal—Review of findings of fact—Findings based on credibility.

Where the findings of fact in Courts below are based upon conclusions from the evidence and what inferences should be drawn from the conduct of the parties, an appellate Court is in as good a position as the trial judge and has not only a right but a duty to form its own opinion upon the facts. *Jones et al. v. Hough et al.* (1879), 5 Ex. D. 115; *The North British & Mercantile Insurance Company v. Tourville et al.* (1895), 25 S.C.R. 177 at 197, applied.

Even where a trial judge's finding is based upon the credibility of a witness, an appellate Court may reject that finding if it considers that he has failed to use the advantage afforded to him of seeing the witness and observing his demeanour in the witness-box. *S.S. Hontestroom v. S.S. Sagaporack,* [1927] A.C. 37 at 47, applied.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], affirming a judgment of Doiron J.[2] in favour of the plaintiffs. Appeal allowed, Kerwin C.J. and Abbott J. dissenting.

[1] 22 W.W.R. 389, [1957] I.L.R. 1-267, 9 D.L.R. (2d) 179.
[2] (1956), 20 W.W.R. 36.

A. J. Campbell, Q.C., for the defendant, appellant.

W. H. Morrison, for the plaintiffs, respondents.

The judgment of Kerwin C.J. and Abbott J. was delivered by

THE CHIEF JUSTICE (*dissenting*):—Having considered the record I find myself in agreement with the trial judge and the majority of the Court of Appeal that, assuming that the agent Bell had authority to agree to cancellation of the policy on behalf of the defendant company, he did not do so; he did nothing, and in my view there is no evidence which warrants a finding that the policy was cancelled by mutual agreement.

The words "as to the proof of loss to be given by the insured" in s. 162 of *The Saskatchewan Insurance Act*, R.S.S. 1953, c. 133, should be read as including a failure to "forthwith after loss give notice to the insurer", as required by stat. con. 15, and I, therefore, also agree with the construction of that section, when read with the statutory condition. Section 162 reads as follows:

> 162. In any case where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured and a consequent forfeiture or avoidance of the insurance, in whole or in part, and the court deems it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as may seem just.

Under the circumstances the Court should deem it inequitable that the insurance should be forfeited or avoided.

I would dismiss the appeal with costs.

The judgment of Taschereau, Rand and Locke JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for Saskatchewan[1] dismissing the appeal of the present appellant, the defendant in the action, from a judgment of Doiron J.[2]

The action was brought upon a policy of fire insurance issued by the appellant company to the respondents upon a building known as the Lunn Hotel, and its contents, situate at Canora, Saskatchewan. The policy was described in the statement of claim as having insured the respondents

[1] 22 W.W.R. 389, [1957] I.L.R. 1-267, 9 D.L.R. (2d) 179.
[2] (1956), 20 W.W.R. 36.

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against loss by fire on the building in the amount of $26,000, on the hotel and household furniture, supplies and personal effects $16,000, and on liquors as might be permitted by law, tobacco and smokers' sundries $2,000, the term being from December 3, 1953, to December 3, 1956. The policy was delivered to the assured with a letter dated December 24, 1953, from A. D. McNally, who carried on business as an insurance agent under the name of Williams Agencies at Canora, and who was at that time the agent of the appellant company at that place. The amount of the premium was $867 which McNally had agreed to accept by annual instalments over a period of three years, and the first instalment of $346.80 was paid to him by the assured on February 19, 1954. The second instalment was to be $260.10 and this was to be paid on December 3, 1954.

At some unspecified date in 1953 the respondents obtained a further policy of fire insurance for $12,000 upon the hotel building in the Merchants and Manufacturers Insurance Company.

On December 3, 1954, the Saskatchewan Government Insurance Office issued its policy of fire insurance to the respondents covering the same property for the total sum of $45,500 allocated: $25,000 to the building, $19,000 to the hotel and household furniture, and $1,500 to liquors, tobacco, etc. This policy was for a period of one year only. It was dated October 19, 1954, and signed on behalf of the Government Insurance Office by H. L. Hammond, the manager. It contained a co-insurance clause which required the assured to maintain insurance "concurrent in form with this policy on each and every item insured to the extent of at least 80% of the actual cash value thereof", and providing that failure to do so would render the assured a co-insurer "to the extent of an amount sufficient to make the aggregate insurance equal to 80%".

On December 16, 1954, the premises and contents were damaged by fire, the loss as determined by the adjuster hereinafter referred to being the sum of $18,699.18. It is the contention of the appellant that its policy was terminated by mutual consent on December 10, 1954. A second contention is that, even if the policy was in force on December 16, 1954, when the fire occurred, any claim under

it is barred, due to the failure of the assured to give to the company notice of the loss, as required by para. (*a*) of stat. con. 15.

There was a direct conflict in certain of the evidence given on behalf of the respective parties affecting the first of these questions and, as it is the contention of the appellant that the learned trial judge misdirected himself as to the nature of the evidence in making his finding that there had not been an agreement that the policy should be terminated, it is necessary to closely examine the evidence.

A. T. Brown of Regina, whose company was the general agent of the appellant, had heard of the fire at the hotel during the afternoon of December 16 and, on the following day, telephoned to Bodnorchuk to get particulars of the loss. Brown's evidence of that discussion is that, after he had identified himself to Bodnorchuk as the general agent of the appellant company, the latter told him that he wanted nothing to do with that policy, that it was cancelled. His further account of the conversation reads in part:

> I said: "What do you mean; it is cancelled?" because I had heard nothing of it being cancelled. He said: "I told Bell that I don't want it. It isn't being replaced [*sic*]."

In answer to a question from the trial judge as to what Bodnorchuk had said, the witness replied:

> He said: "I don't want your policy." He said: "I have told your agent he is to have it. We don't want it." I said: "What about your fire?" He said: "Oh, there is an adjuster here now. I have got insurance with the Government."

Brown said further:

> I said: "Well, I can't get hold of Mr. Bell and where is the policy?" He said: "I don't know,—but just a minute . . ." and goes away and comes back and says: "It is here. He is supposed to pick it up but it is still here" . . .
>
> I said: "That's fine. If you don't want the policy and have got other insurance covering, you will just hand it to Mr. Bell and it is all washed out." He said: "That's fine." . . .
>
> He said he would give the policy back. I said: "You will give the policy back to Mr. Bell?" He said: "Yes. As soon as he comes in, I will give the policy back."

Bell had succeeded to the interest of McNally in the business of the Williams Agencies at Canora. The reference to the adjuster was to L. M. Gonick, an insurance adjuster residing in Winnipeg who had been sent to adjust the loss by the Saskatchewan Government Insurance Office and

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the Merchants and Manufacturers Insurance Company. Referring to Brown's evidence, the learned trial judge said[1]:

> Bodnorchuk is rather evasive in his evidence with regard to this conversation when he says he believed he informed Mr. Brown that the policy had been cancelled but was not sure. I have no reason to disbelieve Brown's evidence, but if Brown had known that the policy was cancelled he would not have contacted Bodnorchuk.

According to Gonick, he got to Canora on the morning following the fire and registered at the hotel. After taking particulars as to how the fire had occurred, he asked Bodnorchuk to produce his insurance policies for his inspection. The latter produced the Saskatchewan Government Insurance Office policy, that of the Merchants and Manufacturers Company and the policy issued by the appellant. Gonick said he took the policies and, in Bodnorchuk's presence, started to take particulars and that when he came to the policy issued by the appellant, Bodnorchuk told him not to list or include that policy as it had been cancelled. His further account of what then took place between them reads:

> I asked him for an explanation, and what he said was that the Union—what Mr. Bodnorchuk said was this; that the Union Marine Insurance Company policy was written for a term of three years on the basis of a partial payment plan; that is, 40 per cent. of the premium was to be paid the first year, 30 per cent. the second year and 30 per cent. the third; that the first year's premium was paid and that the second year instalment of 30 per cent. was coming due—or due; that he had obtained a better rate from the Saskatchewan Government Insurance Office than what he was paying to the Union Marine Insurance Company, and therefore he decided —he instructed the Saskatchewan Government Insurance agent to issue a policy to them to replace the one that is with the Union Marine Insurance Company. He said that an agent by the name of Bell came to see him on the first week in December and asked him for the second year premium. Bodnorchuk told Bell that he had replaced the Union Marine policy with the Saskatchewan Government Insurance policy on account of the rate being lower, that he wasn't going to retain it. He wanted it cancelled. He went on to tell me that Mr. Bell, who had just recently purchased the insurance business in Canora, had talked him into keeping the policy—or tried to talk him into keeping the policy—as he didn't want to lose the commission. So he told Mr. Bell that he would think it over, he would discuss it with his partner and think it over, and Bell should return to see him in a few days. He told me that Bell did return to see him in a few days, and at this time he again told him that he definitely decided not to retain the Union Marine Insurance Company policy, and that Bell told him he would return and pick the policy up.

[1] 20 W.W.R. at p. 38.

On the day following, Gonick said that he saw Bell who at the time produced the original policy issued by the appellant to the respondents and there was a discussion regarding it. As neither of the respondents was present, evidence as to what Bell said at that time was inadmissible. Gonick left Canora that day.

According to Bodnorchuk and Bell, they had had discussions on December 4 and December 10 at which the cancellation of the appellant's policy had been discussed. I will deal with this evidence later in some detail. Bell had, according to his own account, been called away from Canora on December 13 and, before going, had written and signed a letter addressed to A. T. Brown & Co. Ltd. returning the policy that had been issued to the respondents and had asked McNally to get the policy from Bodnorchuk and enclose it with the letter and mail it. McNally had not done this and the letter had not been sent. He said that, so far as he could remember, it read:

> We are enclosing the above numbered policy for cancellation, as the Lunn Hotel is insured elsewhere—as the insured had placed his business elsewhere.

It is not suggested that Bell had seen or had any further discussion with Bodnorchuk between December 10 and 13.

While this demonstrates that Bell understood—as did Bodnorchuk—that the policy had been terminated on December 10, on December 20, four days after the fire and after Gonick had left Canora, he went to Bodnorchuk and, according to the latter, assured him that the policy was in full force and induced him to pay $260 as the instalment which had become due on December 3. Bell admits that he had not been instructed by the company to do this and the payment was refused by it and the money paid back to Bodnorchuk.

On January 25, 1955, Mr. W. B. O'Regan, Q.C., went to Canora and interviewed Bodnorchuk on behalf of the appellant company and made a memorandum of that discussion at the time. Mr. O'Regan says that Bodnorchuk told him that Bell had called upon him on December 4 to collect a premium that was due on the Union Marine policy and that he (Bodnorchuk) had then told him that he had applied for a policy with the Saskatchewan Government Insurance Office and would let Bell know definitely if he

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intended to replace the appellant's policy with the Saskatchewan Government policy. Bodnorchuk said further that on December 10 he had again seen Bell and told him that he intended to replace the Union Marine policy with that of the Saskatchewan Government Insurance Office, that he understood that at that time the Union Marine policy was cancelled on being replaced by the Saskatchewan Government policy and that there was no intention of keeping the two policies. Mr. O'Regan had asked Bodnorchuk if he would sign a written statement but this the latter refused to do. He then took a statutory declaration from Bell dealing with the matter.

No claim was made by the respondents upon the appellant company and no notice given to them of the occurrence of the fire until nearly two months after that event had occurred. Notice had been given at once to the Saskatchewan Government Insurance Office and to the Merchants and Manufacturers Insurance Company. On February 5, Bodnorchuk went to Winnipeg and saw Gonick at his office regarding the adjustment of the loss, at which time Gonick told him that, under a co-insurance clause in the Saskatchewan Government policy, the respondents would have to contribute as co-insurers in an amount betwen $5,000 and $6,000.

On February 22, 1955, the respondents executed a proof of loss and made a statutory declaration as to the truth of the claims and statements made in it before their solicitor, Mr. Walker, Q.C., of Canora, for their claim against the Saskatchewan Government Insurance Office. This showed the cash value of the hotel and household furniture, as distinct from the building, as being $15,614.32 and claimed an amount of $7,743.90. The proof was on a printed form which required the assured to furnish the names of other insuring companies and, under this heading, there appeared only the words "Merchants & Manufacturers $12,000.00".

On the same day Bodnorchuk wrote to the appellant at Winnipeg asking that settlement be made under its policy. The claim was promptly rejected and the action ensued.

Both the respondents gave evidence at the trial. Bell was called as a witness for the defence and gave evidence which, the learned counsel who appeared for the company at the trial said, was not in accordance with the

declaration he had sworn to at the request of Mr. O'Regan. Counsel's request to cross-examine Bell as a hostile witness was refused by the learned trial judge.

The evidence given by Bodnorchuk is impossible to reconcile with the statements made by him to Brown, Gonick and O'Regan and with his own conduct between the date of the fire and February 22. According to him, he had applied for the insurance with the Saskatchewan Government Insurance Office prior to December 4, 1954, and he had already accepted the policy which was dated the previous October and which insured the property from December 3. He, however, said that when Bell came to him on December 4 to collect the premium on the Union Marine policy which had become due the previous day, he had told him that they might pay it but they might cancel the policy, and that he had placed an application with the Saskatchewan Government Insurance Office for a policy for about the same amount. As to the interview on December 10, he says that he then told Bell that they were still undecided about the Union Marine policy and did not know what they were going to do with it, and that matters remained in this state until after the fire when Bell came to see him and said that the policy was in full force. He denies that he had told Brown on the telephone that the Union Marine had nothing to do with the loss since their policy was cancelled or that he had told Brown to forget about the matter.

When asked if Brown had asked him if the policy was still in his possession and if after looking for it he had told Brown that he still had it, he said he could not remember. When asked if he had said to Brown that he would give the policy back to Bell when the latter came back, he said at first that he did not think he had said that but then denied it. As to the conversation with Gonick, Bodnorchuk swore that he did not tell the adjuster that the Union Marine policy was cancelled but told him they were going to cancel it. He also said that he had not told Gonick not to list the Union Marine policy as that policy was cancelled. As to the statements made to Mr. O'Regan, he said he did not think that he had told him that his understanding was that the Union Marine policy had been cancelled on December 10 and did not deny that he had told him that he had no intention of keeping both the Union Marine and the Saskatchewan Government policies. When cross-examined upon

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a number of answers that he had made on discovery, which were inconsistent with his evidence at the trial, his attempted explanations failed to explain the variance. In many cases his evidence at the trial and that given on discovery were contradictory. Thus at the trial he was asked if he had told Bell on December 4 that if they took the Saskatchewan Government policy they would not want to continue the Union Marine policy and he denied it but, on discovery, he had admitted it. Asked if he had told Bell on December 4 that they had no intention of carrying both policies, he swore he had not and that he had not told Bell that he and his partner had decided to take the Saskatchewan Government insurance to replace the Union Marine policy. He had been asked about this on discovery and said that he did not deny having said this to Bell but could not remember whether he had. He had been asked on discovery if on December 4 he had told Bell that they were thinking of replacing the Union Marine policy with the Saskatchewan Government policy and had said that that was right, but at the trial he said this was a mistake and they were not considering replacing it.

Upon this aspect of the matter it is to be remembered that the appellant's policy insured the hotel and household furniture for an amount of $16,000 and the policy of the Saskatchewan Government for the amount of $19,000 while the value of the property, agreed to by Bodnorchuk with Gonick on February 5, 1954, was only $15,614.32. When cross-examined as to this at the trial, he said the hotel and household furniture "could have been" worth $35,000.

Bell, on his own evidence, failed to fulfil his duty as agent to act in good faith for the protection of the interest of his principal. His evidence may be summarized by saying that he agreed with Bodnorchuk that the latter had said on December 4 that they were not prepared to pay the premium at that time because Bodnorchuk did not know whether they were going to continue the Union Marine policy or not and that on December 10 they were still undecided and were going to leave the matter for a few days. He admitted that he had not received any instructions from the appellant company to collect the premium

or to tell Bodnorchuk that the policy was then in force. The following passage from his evidence is illuminating:

Q. Isn't it a fact that your main concern at that time was to keep friendly with these people, the insured? A. Yes. They are still friends of mine.

Q. You wanted to be friendly? A. Yes.

THE COURT TO WITNESS: Q. You wanted his [*sic*] commission? A. Yes, I think everyone would do.

MR. BASTEDO CONTINUING: Q. You wanted your commission and wanted to keep friendly with them? A. Yes.

Q. Was that why you let him pay the insurance? THE COURT: That is a double-barrelled question.

MR. BASTEDO: How can I prove he is hostile without having some cross-examination of the matter?

THE COURT: He wanted the cheque because he wanted his commission on it.

WITNESS: That is not entirely true.

It is manifestly impossible to reconcile Bell's evidence as to what had occurred between him and Bodnorchuk on December 10 with his conduct following that date. It will be remembered that Bodnorchuk told Brown on December 17 that he had told Bell he did not want the policy, that it was cancelled and that he had told Bell to "pick the policy up". Bodnorchuk was, according to Brown, not sure that he still had the policy but, after looking among his papers, found that he had it and said that Bell had not yet picked it up. That it had been arranged that the policy be surrendered to Bell is confirmed by the arrangement he made with McNally above referred to and the letter he wrote to A. T. Brown & Co. Ltd. on December 13.

For some reason that I cannot understand, the original policy of insurance issued by the appellant was not put in evidence at the trial. It had been produced and marked on the examination for discovery of Bodnorchuk as ex. D-1. When the respondent Bodnorchuk was giving his evidence in chief at the trial his counsel produced a document which, he said, was a duplicate original of the policy and it is this document which appears in the case filed in this court. It is not a policy of insurance at all and does not purport to be. It consists of the usual memorandum kept by fire insurance agents of policies issued through their agency, giving the name of the insuring company, the name of the insured, particulars as to the person to whom the loss is payable, the amount of the insurance, the rate, the premium and

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the term and the dates of commencement and expiry. The original of this document which I have examined bears at the foot of it these words "A. T. Brown & Co. Ltd. A. D. McNally". Pasted on the face of this memorandum are the usual particulars endorsed upon fire insurance policies showing the amount of the cover upon the various things insured, some other clauses defining certain terms used in the endorsement such as the word "building" and particulars of the persons to whom the loss was payable. This bears the same signature as the memorandum. There is also attached a printed form describing additional perils covered by the policy. Counsel for the respondents at the trial said it was a duplicate original but in this he was completely mistaken. There is no covenant to insure contained in the document so described. It does not contain the statutory conditions that must be included in every fire insurance policy in Saskatchewan. Fire insurance companies do not issue policies in duplicate, so far as I am aware, and there is not the slightest evidence to support the statement that a duplicate of the original policy, which is not before us, was ever issued by the appellant.

I am also unable to understand how it is that the copy of this document, which was made ex. P-3 at the trial, as it appears at p. 89 of the case, contains at the foot of one of the endorsements the words "A. T. Brown & Co. Ltd. A. T. Brown" as no such signature appears on the original document and five of the various sheets which compose it are signed "A. T. Brown & Co. Ltd. A. D. McNally".

At the trial, while counsel for the present appellant was putting in portions of the examination for discovery of Bodnorchuk, including the questions and answers where the original policy had been produced and marked as ex. D-1, counsel for the present appellant said:

> I will ask my learned friend where the original is, because I thought we were referring to the original this morning. I am quite prepared to take a certified copy, but I don't want my learned friend to comment on the fact that one of the witnesses got confused between the original and a certified copy.

The answer made by counsel for the respondent was:

> Sorry, that is the only one I have got.

It is regrettable that the original policy of insurance does not form part of the evidence. It is upon that document that the respondents' claim is based. Any claim based on

the document P-3 could not succeed since there is no covenant to insure. The matter, however, has some further significance and bears upon the veracity of both Bell and Bodnorchuk.

Gonick had sworn before Bell gave his evidence that the original policy was in Bell's possession and exhibited by him to Gonick on the morning of December 18. It had been in Bodnorchuk's possession on the previous day. That Bodnorchuk, who had already told Gonick that the policy had been cancelled, would hand it back to Bell when the latter returned to Canora would be entirely in accord with what he had told Brown he would do. The significance of the possession of the original policy by Bell at that time apparently did not escape the attention of both Bell and Bodnorchuk and Bell denied that he had shown the policy to Gonick, and Bodnorchuk that he had ever given the policy to Bell. The learned trial judge and the judgment of the majority of the Court of Appeal refer to the fact that Bodnorchuk had the original policy in his possession when examined for discovery, apparently regarding this as showing that it had never left his possession. But that does not follow. On the contrary, it indicates to me that after Gonick left Canora on December 18 Bell gave the policy back to Bodnorchuk on or before December 20, when he collected the second instalment of the premium and assured Bodnorchuk, according to the latter and to Nawakowsky, that the policy was in force.

Gonick was shown the document P-3 at the trial and asked if that was what he had seen in Bell's possession and replied that it was not, but that he had seen the original policy. It is suggested in the judgment of the trial judge that Gonick may have been mistaken and that what he saw was a copy. As to this, Gonick is an insurance adjuster who has had 30 years' experience and, apart from the fact that there is no evidence that there ever was any copy of the policy in existence, it is quite impossible to believe that this experienced adjuster would not recognize an original when he saw it.

Why the original policy was not put in at the trial and why the letter written by Bell to A. T. Brown & Co. Ltd. was not produced is merely a matter for speculation upon the present record. The exhibit P-3 was not really admissible in evidence at all in the absence of evidence that the

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original policy had been either lost or destroyed. I think to have been able to examine both of these documents might have been of assistance in arriving at the truth in this matter.

While Nawakowsky gave evidence at the trial, his evidence was restricted to saying that he had seen Bodnorchuk pay Bell the $260 on December 20 and that Bell had said that the policy was then in force.

The learned trial judge has found that no agreement to terminate the policy was made out at the trial. In coming to this conclusion, he said in part[1]:

> It emerges from the whole of the evidence that Bodnorchuk *thought* it was cancelled and that it is only after he found out that he was a co-insurer in the Saskatchewan Government Insurance Office policy that he sought to enforce his rights under the defendant's policy.

And again[2]:

> It is rather difficult to close one's eyes to the repeated assertions by the plaintiff Bodnorchuk that the defendant's policy was cancelled or replaced. On the other hand, Bell says it was definitely not cancelled on December 4 or 10. In my opinion there must be more than an intention to cancel—there must be mutuality of the minds . . .

Earlier in the judgment the learned judge had said that there was substantially no difference as to the matter of cancellation in the evidence given by Bodnorchuk or Bell.

The learned Chief Justice of Saskatchewan who delivered the judgment of the majority of the Court of Appeal has said that he agreed with Doiron J. that there was no mutual agreement to cancel the policy and found no evidence of any such agreement. No reference is made to his finding that Bodnorchuk had repeatedly said that the policy was cancelled or replaced, or the significance of that finding as to the credibility of Bell. I must assume that this was not considered. There was, indeed, in the face of the evidence of these two men no direct evidence of an agreement, but the Court is not thereby relieved of the obligation of drawing the proper inferences of fact from what they said and did.

The finding that Bodnorchuk asserted at various times that the policy had been cancelled and replaced and that he thought until February 1954 that the appellant's policy had been cancelled is a plain rejection of the evidence of both Bodnorchuk and Bell at the trial as to what happened

[1] 20 W.W.R. at p. 39. [2] *Ibid.* at p. 45.

between them on December 10 and of Bodnorchuk's repeated denials of having said this to any one. If, as they both swore, all that there occurred was that Bodnorchuk then indicated an intention to cancel the policy but nothing more, it is, of course, quite impossible that thereafter he would have thought that the policy was at an end or that Bell would have written the letter to the insurance company and instructed McNally to get the policy and return it to the Regina office. As the learned judge did not believe Bodnorchuk it necessarily follows that he did not believe Bell. With this finding I am in complete agreement. For the reasons above stated, I think the evidence of these witnesses on the vital point in this case was demonstrated to be false.

While thus not believing Bell's account as to what had occurred on December 10, the learned trial judge appears to base his conclusion that it had not been agreed to terminate the policy on that day on his evidence. I am unable, with great respect, to follow this reasoning or to agree with his conclusion.

If this were a matter involving on this point the credibility of a witness, I would not hesitate to disagree with the learned trial judge as I would consider that he had failed to use the advantage afforded to him of having seen the witness and observed his demeanour in the witness-box in coming to his conclusion: *S.S. Hontestroom v. S.S. Sagaporack; S.S. Hontestroom v. S.S. Durham Castle*[1], *per* Lord Sumner at p. 47. However, that is not this case since he obviously did not believe the evidence of Bodnorchuk and Bell that all that was done on December 10 was that Bodnorchuk said that he was considering cancelling the policies. The proper conclusions from the other evidence and the question as to what inferences are to be drawn from the conduct of the parties are matters upon which this Court is in an equally good position as the learned trial judge and the learned judges of the Court of Appeal.

In these circumstances, it is not only our right but, as expressed by Bramwell L.J. in *Jones et al. v. Hough et al.*[2], our duty to form our own opinion upon the facts. In *The North British & Mercantile Insurance Company v. Tourville et al.*[3], an action brought upon an insurance policy

[1] [1927] A.C. 37.
[2] (1879), 5 Ex. D. 115.
[3] (1895), 25 S.C.R. 177.

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which the defendant sought to avoid on the ground of fraud and where there had been concurrent findings in the Courts below, Taschereau J., delivering the judgment of the Court, referred to what had been said by Bramwell L.J. in *Jones et al. v. Hough et al.*, and said (p. 195):

> We do not fail to take into consideration, I need hardly say, that the fact of the two provincial courts having come to the same conclusion enhances the gravity of our duties, and imposes upon us, more than might perhaps be required under other circumstances, the strict obligation not to allow the appeal without being thoroughly convinced that there is error in the judgment. But, at the same time, we would unquestionably be forgetful of our duties if we did not form an independent opinion of the evidence, and give the benefit of it to the appellants if they are entitled to it.

It is, I think, unnecessary to repeat the evidence which points irresistibly to the conclusion that the policy issued by the appellant had been replaced by that of the Saskatchewan Government Insurance Office and that on December 10 it was agreed between these two men that the policy was terminated and should be surrendered. It was apparently at Bell's request that Bodnorchuk had deferred his decision to terminate the policy on December 4 and, if not expressed, I would infer that it was an implied condition of the arrangement that the appellant would not ask for payment of the earned premium between December 3 and 10. No one, I think, would seriously suggest that after what transpired the appellant could have sued for the premium due on December 3. While the word "cancellation" has been used throughout these proceedings, I think it would be more accurate to refer to what was agreed to as a termination of the policy. A policy of fire insurance may, of course, be terminated by mutual agreement and, as all experienced lawyers and businessmen in western Canada know, this is constantly done by simply surrendering the policy and, if not already paid, paying the premium earned up to the time of surrender. An arrangement of this kind has nothing to do with the cancellation of the policy under stat. con. 10.

We do not know whether the original policy was signed in the name of the Brown company or by McNally, but it is the latter whose signature appears upon the document P-3, and a letter put in at the trial shows that he was authorized to agree to accept the three-year premium by instalments. It is not suggested that his successor Bell did not have the

same power or authority to agree to the termination of the policy and the waiver of the premium earned after December 3. In cases such as this where the oral evidence is as obviously unreliable as that given by Bodnorchuk and Bell, the truth can best be ascertained by inferences to be drawn from their conduct. I think no other reasonable inference can be drawn than that which I have above stated.

In view of my conclusion that the policy was terminated on December 10, 1954, it is unnecessary to deal with the question discussed by Mr. Justice Gordon as to whether s. 162 of *The Saskatchewan Insurance Act,* R.S.S. 1953, c. 133, is wide enough to empower the Court to relieve the respondent from the necessity of giving notice in writing of the fire to the company forthwith after the loss. If there is such power, I agree completely with that learned judge who dissented from the judgment of the majority that this is not a case where relief should be given. The failure to give the notice required by the statutory condition was deliberate. The case for the respondents, in my opinion, is entirely devoid of merit.

I would allow this appeal with costs throughout and direct that the action be dismissed.

Appeal allowed and action dismissed with costs throughout, KERWIN C.J. *and* ABBOTT J. *dissenting.*

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