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THE MANITOBA ASSURANCE COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

ROBERT J. WHITLA AND ANOTHER (PLAINTIFFS) ..... } RESPONDENTS.

*Nov. 2, 3.
*Nov. 30.

ROBERT J. WHITLA AND ANOTHER (PLAINTIFFS) ..... } APPELLANTS;

AND

THE ROYAL INSURANCE COMPANY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR MANITOBA.

Fire insurance—Condition of policy — Double insurance—Application—Representations and warranties — Substituted insurance—Condition precedent—Lapse of policy—Statutory conditions—Estoppel.

B., desiring to abandon his insurance against fire with the Manitoba Assurance Co. and, in lieu thereof, to effect insurance on the same property with the Royal Insurance Co., wrote the local agent of the latter company stating his intention and asking to have a policy in the "Royal" in substitution for his existing insurance in the "Manitoba." On receiving an application and payment of the premium, the agent issued an interim receipt to B. insuring the property pending issue of a policy and forwarded the application and the premium, with his report, to his company's head office in Montreal where the enclosures were received and retained. The interim receipt contained a condition for non-liability in case of prior insurance unless with the company's written assent, but it did not in any way refer to the existing insurance with the Manitoba Assurance Co. Before receipt of a policy from the "Royal" and while the interim receipt was still in force, the property insured was destroyed by fire and B. had not in the meantime formally abandoned his policy with the Manitoba Assurance Co. The

*PRESENT:– Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

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latter policy was conditioned to lapse in case of subsequent additional insurance without the consent of the company. B. filed claims with both companies which were resisted and he subsequently assigned his rights to the plaintiffs by whom actions were taken against both companies.

Held reversing both judgments appealed from, (14 Man. L. R. 90) that, as the Royal Insurance Company had been informed, through their agent, of the prior insurance by B. when effecting the substituted insurance, they must be assumed to have undertaken the risk notwithstanding that such prior insurance had not been formally abandoned and that the Manitoba Assurance Co. were relieved from liability by reason of such substituted insurance being taken without their consent.

Held, further, that, under the circumstances, the fact that B. had made claims upon both companies did not deprive him or his assignees of the right to recover against the company liable upon the risk.

The Chief Justice dissented from the opinion of the majority of the court which held the Royal Insurance Company liable and considered that, under the circumstances, B. could not recover against either company.

APPEALS from the judgments of the Court of King's Bench for Manitoba, *en banc*, (1) affirming the judgments of the trial court, by which the action against the Manitoba Assurance Company was maintained with costs, and the action against the Royal Insurance Company was dismissed with costs.

The circumstances under which the actions were instituted and the questions at issue on the present appeals are stated in the judgments now reported.

J. Stewart Tupper K.C. and *Phippen* for the Manitoba Assurance Company, appellants. We submit that a subsequent insurance with the Royal Insurance Company was proved. This was subsequent insurance within the meaning of the 8th statutory condition, even if invalid. But a subsequent valid insurance with the Royal Insurance Company, to take effect

(1) 14 Man. L. R. 90.

on the 7th of January, 1901, when its interim receipt was issued, has been proved.

Even if the insurance with the Manitoba Assurance Company was not abandoned by the issue of the interim receipt by the Royal Insurance Company and the omission to notify the appellants thereof, the insurance with the Royal Insurance Company was nevertheless a valid insurance, as its duly authorized agent had full knowledge of the prior insurance before they issued their interim receipt and accepted the premium which they never returned. *Wing* v. *Harvey* (1); *Bawden* v. *London, Edinburgh & Glasgow Assurance Co.* (2); *Watteau* v. *Fenwick* (3); *Gore District Mutual Fire Insurance Co.* v. *Samo* (4); *Liverpool & London & Globe Insurance Co.* v. *Wyld* (5); *Hastings Mutual Fire Insurance Co.* v. *Shannon* (6); *Naughter* v. *Ottawa Agricultural Insurance Co.* (7); *Hatton* v. *Beacon Insurance Co.* (8). The validity of the appellants' contract does not depend on whether or not the subsequent insurance was to be adjudged valid or invalid. The court cannot decide on the validity of the subsequent insurance in this action to which the Royal Insurance Company is not a party. *Ramsay Cloth Co.* v. *Mutual Insurance Co.* (9), per Robinson C.J., at page 523. It is immaterial whether the subsequent insurance might be strictly a legally binding contract. It was an insurance in fact made. *Mason* v. *Andes Ins. Co.* (10); *Jacobs* v. *Equitable Insurance Co.* (11); *Bruce* v. *Gore District Mutual Assurance Co.* (12); *Gauthier* v. *Waterloo Mutual Insurance Co.* (13).

(1) 5 DeG. M. & G. 265.
(2) [1892] 2 Q. B. 534.
(3) [1893] 1 Q. B. 346.
(4) 2 Can. S. C. R. 411.
(5) 1 Can. S. C. R. 604.
(6) 2 Can. S. C. R. 394.
(7) 43 U. C. Q. B. 121.
(8) 16 U. C. Q. B. 316.
(9) 11 U. C. Q. B. 516.
(10) 23 U. C. C. P. 37.
(11) 19 U. C. Q. B. 250.
(12) 20 U. C. C. P. 207.
(13) 44 U. C. Q. B. 490; 6 Ont. App. R. 231.

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Haggart K.C. for Whitla *et al.*, respondents. If there was no complete contract with The Royal Ins. Co., no valid subsequent insurance existed; and the case is within the principle of *Commercial Union Assurance Co.* v. *Temple* (1). The plaintiffs frankly admit that should this court reverse the judgment in the suit against the Royal Insurance Company and direct a verdict to be entered for the plaintiffs in that suit, then they could not successfully hold their verdict in this case to the extent of the $2,000 covering the stock in trade. There would then be a breach of the 8th statutory condition indorsed on the "Manitoba" policy as to the insurance on the stock in trade. *Commercial Union Assurance Co.* v. *Temple* (1); *Western Assurance Co.* v. *Temple* (2): The subsequent insurance referred to in the 8th statutory condition must be a valid insurance existing at the time of the fire. The same principle has been affirmed in Massachusetts in respect to policies containing similar conditions. The subsequent insurance being inoperative, the first policy remains in force and that subsequent insurance, void by its own terms, is no insurance within the meaning of the usual conditions against other insurance, although the subsequent insurance be in fact paid. *Hardy* v. *Union Mutual Insurance Co.* (3); *Clark* v. *New England Mutual Fire Insurance Co.* (4); *Stacy* v. *Franklin Fire Insurance Co.* (5); *Philbrook* v. *New England Mut. Fire Insurance Co.* (6); *Germania Fire Insurance Co.* v. *Klewer* (7).

If there is a valid contract with The Royal Ins. Co. then there is double insurance as to the stock in trade, but there is, however, no double insurance as to the

(1) 29 Can. S. C. R. 206.
(2) 31 Can. S. C. R. 373.
(3) 4 Allen (Mass.) 217.
(4) 6 Cush. (Mass.) 342.
(5) 2 Watts & Sargeant (Penn.) 506 at p. 544.
(6) 37 Maine 137.
(7) 129 Ill. 599.

household furniture, wearing apparel, jewellery and piano. The Royal Insurance Company's interim receipt does not cover these articles. The insurance, there, is "on general stock."

Haggart K.C. for Whitla *et al.*, appellants. The contract with the Royal Insurance Company was a provisional agreement with the company's duly authorized agent for such purposes. It was made after full disclosure of all the circumstances and there was no condition exacted as to Bourque formally abandoning the prior insurance as a condition precedent to the substituted insurance attaching. Porter on Insurance (3 ed.) 447; *Union Mutual Insurance Co.* v. *Wilkinson* (1); *Cockburn* v. *British America Assurance Co.* (2); May on Insurance (4 ed.) sec. 132; *Wing* v. *Harvey* (3); *Liverpool & London & Globe Fire Ins. Co.* v. *Wyld* (4); *McQueen* v. *Phœnix Mutual Fire Ins. Co.* (5); *Hastings Mutual Fire Ins. Co.* v. *Shannon* (6); Holt "Insurance Law of Canada" p 494. See remarks of Moss C.J. as to warranties at page 495 in *Worswick* v. *Canada Fire and Marine Ins. Co.* (7); also *Grant* v. *Ætna Ins. Co.* (8); and *Gibson* v. *Small* (9).

The company waived any breach of the condition by failing to object when they had knowledge of the prior insurance and retaining the premium paid to them. May on Insurance (4 ed.) secs. 143, 498; Beach, secs. 764, 797, 802; Porter (3 ed.) 190, 212; *Dominion Grange Mut. Fire Ins. Co.* v. *Bradt* (10); *Law* v. *Hand-in-Hand Mut. Ins. Co.* (11); *Hopkins* v. *Manufacturers & Merchants Mut. Insurance Co.* (12).

(1) 13 Wall. 222.
(2) 19 O. R. 245.
(3) 5 DeG. M. & G. 265.
(4) 1 Can. S. C. R. 604.
(5) 4 Can. S. C. R. 660.
(6) 2 Can. S. C. R. 394.
(7) 3 Ont. App. R. 487.
(8) 15 Moo. P. C. 516.
(9) 4 H. L. Cas. 353.
(10) 25 Can. S. C. R. 154.
(11) 29 U. C. C. P. 1.
(12) 43 U. C. Q. B. 254.

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Munson K.C. and *J. Travers Lewis* for the Royal Insurance Company, respondents. There was not to be any contract of insurance until the prior insurance with the "Manitoba" Company had been abandoned. If the interim receipt be considered as having become effective, it became so merely as an executory contract, which could not be enforced until the prior insurance had been abandoned.

The interim receipt was not binding on the company, however, owing to the non-payment in cash of the whole of the premium. The agent's authority was dependent upon payment of the premium in cash, which is not proved. *Canadian Fire Insurance Co.* v. *Robinson* (1); *London & Lancashire Life Ass. Co.* v. *Fleming* (2); *Acey* v. *Fernie* (3). The appellants should, therefore, have pleaded and proved such payment, and having failed to do so, cannot succed. In any event, the appellants cannot succeed on the interim receipt as under condition number eight, indorsed on it, the company is not liable for loss in case of prior insurance. If the respondents cannot rely upon this eighth condition, as indorsed on the interim receipt, they claim the benefit of it as one of the conditions indorsed on the policy, which was issued in pursuance of the interim receipt, because the right of action upon such a receipt still depends, as it did before the fusion of law and equity, upon the right to a specific performance of the agreement which it involves to issue a policy or other contract in binding form. In determining whether specific performance should be granted, the court will look at all the surrounding circumstances, and in the present case the trial judge has found that Bourque must be taken to have understood that Dumouchel expected the prior insurance to

(1) 31 Can. S. C. R. 488. (2) [1897] A. C. 499.
(3) 7 M. & W. 151.

be abandoned This finding is approved of by Mr. Justice Bain, and would be sufficient in itself to disentitle the appellants to specific performance.

We refer also to *Dominion Grange Mut. Fire Ins. Co.* v. *Bradt* (1); *Hawke* v. *Niagara District Mut. Fire Ins. Co.* (2); *Western Assurance Co.* v. *Doull* (3); *Jackson* v. *Massachusetts Mut. Fire Ins. Co.* (4); *Skillings* v. *Royal Insurance Co.* (5); *Barnard* v. *Faber* (6); *Edington* v. *Fitzmaurice* (7); *North British & Mercantile Ins. Co.* v. *McLellan* (8); *Compton* v. *Mercantile Ins. Co.* (9); *Browning* v. *Provincial Ins. Co.* (10); Fry on Specific Performance (2 ed.) 407.

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THE CHIEF JUSTICE.—The facts of this case appear at full length in the report of it in the Manitoba Court at page 90, vol. 14, of the Manitoba Reports.

Some confusion may arise, and has perhaps arisen, from the course pursued in the full court where this case and one by the same plaintiffs against the Royal Insurance Company appear to have been heard together. They were not tried together by the learned Chief Justice of Manitoba, and were not heard together at our bar. This action was taken nearly four months after the other. It was tried after the other as a distinct and separate case. I think that this was the right course to pursue. The two cases have to be considered independently of each other. The result of one should not in any way influence the result of the other.

We are not concerned in this case with the ultimate determination of the respondents' action against the

(1) 25 Can. S. C. R. 154 at p. 163.
(2) 23 Gr. 139.
(3) 12 Can. S. C. R. 446.
(4) 23 Pick. 418.
(5) 4 Ont. L. R. 123.
(6) [1893] 1 Q. B. 340.
(7) 29 Ch. D. 459.
(8) 21 Can. S. C. R. 288.
(9) 27 Gr. 334.
(10) L. R. 5 P. C. 263.

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Royal Insurance Company which cannot even be ascertained from this record.

If the policy with the Royal Company had been obtained by Bourque upon false representations, for instance, making it voidable *ab initio*, and if that policy were not subject to the 8th condition against further insurance, it could not be contended that in such a case, Bourque could recover upon this policy with the appellants notwithstanding his double insurance, simply because he could not recover against the Royal.

There is only a question of fact before us upon this appeal, as I view it.

Were there two policies valid on their face and actually subsisting at the same time on the same property in question? Did Bourque as a matter of fact take a subsequent insurance with the Royal, without the knowledge and consent of the appellant company upon the property insured by them? To these questions there is room for but one answer.

Not only had Bourque applied for and obtained from the Royal a further insurance upon the property upon which he held an insurance in the appellant company, but after the fire he immediately notified the Royal and filed his claim with them, and subsequently through his assignees took an action against them for the amount of his interim receipt. Examined as a witness he says:

Q. Then the insurance in the Royal was a further insurance on the same stock which you claim is covered by the Manitoba Company's policy?—A. Yes.

Q. And you are claiming to-day that the Royal Company is liable to you under that interim receipt for insurance?—A. Yes, well I am claiming as a witness.

Q. Liable to your assignees, the Messrs. Whitla & Company. You are claiming that the Royal Company issued the $3,000 policy called for by this interim receipt?—A. Yes.

Q. After the fire you put in a proof of loss to the Royal Company, this document which I have in my hand?—A. Yes.

Now whether that insurance was valid or not cannot be determined in this case so as to bind the Royal were it necessary to do so. And the question is not whether Bourque intended to doubly insure or not. Did he in fact doubly insure? We have nothing to do with his intentions.

The statutory condition that governs this case, as varied in this policy, reads as follows:

(8.) The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is indorsed hereon, nor if any subsequent insurance is effected in any other company, unless and until the company assents thereto or unless the company does not dissent in writing within two weeks after receiving written notice of the intention or desire to effect the subsequent insurance, or does not dissent in writing after that time and before the subsequent or further insurance is effected.

The appellants were therefore entitled to get from Bourque two weeks' previous written notice of his intention to further insure in the Royal, and they never got any. Neither before nor after taking the interim insurance with the Royal did Bourque give them any. Upon what principle the respondents can support their contention that Bourque was at liberty to so ignore at will a material condition of his contract with the appellants and his obligation thereunder, I entirely fail to see.

This condition does not say, it is true, that the policy is void if any subsequent insurance is effected without notice to a prior insurer; but it says clearly that in such a case the prior company is not liable for loss, that is to say, not bound in law to pay if they choose, as the appellants do here, to avail themselves of the fact that operates avoidance of their obligation to pay. I would dismiss their action with costs.

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The respondents' other contention that they are, in any event, entitled to succeed for the amount of $250, the insurance on household furniture, wearing apparel and jewellery, on which there is no double insurance as they are not covered by the Royal's interim receipt, cannot prevail. The contract of insurance with the appellants was entire and indivisible, and though there is no double insurance as to the articles so separately insured for $250 by the appellants, yet the whole policy is void. *The Gore District Mutual* v. *Samo* (1).

I would allow the appeal and dismiss the action. Costs in all the courts against respondent.

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THE CHIEF JUSTICE.—The facts of this case appear at length in the Manitoba Reports, page 90, of vol. 14.

This action was instituted nearly four months before the other one by the same plaintiffs against the Manitoba company in question in this record. It was tried and determined before that other one, and should be considered and disposed of as if tried and determined before the other one was instituted.

I would dismiss this appeal. Bourque's policy with the Manitoba company was on their books a *de facto* subsisting policy when he insured with the respondents, and at the time of the fire. Had any return to be then made to the Government as required by the statute, the Manitoba company would have had to report Bourque as insured by them. Bourque had covenanted with the respondents that this policy with the Manitoba was to be put an end to by himself by some action on his part, and he never did it *de facto*. We have nothing to do with his intentions. They

(1) 2 Can. S. C. R. 411.

may have been very good, but he did not put them into execution. And what does he do after the fire? Far from himself treating the Manitoba policy as abandoned, he immediately furnished the required proofs of loss and filed his claim with them, and upon their refusal to pay has since instituted an action against them, and as proved in this case, actually recovered a judgment through his assignees for the amount of his insurance with them. Moreover, he swore, when giving his proof of loss to the respondents, that he had another insurance for $2,500 on the same property in the Manitoba Assurance Company. And he would now, forsooth, ask us to declare that he had sworn falsely and that this policy with the "Manitoba" had come to an end before the fire (at what time he, of course, cannot tell) and he never did anything in view of putting an end to it, though he holds his judgment against them upon that policy.

How could the court below come to any other conclusion but that his contentions are untenable? And we have here to determine this case upon the very same facts as they existed and were presented to the court below.

The 8th condition varied in the Manitoba policy as proved in this case, reads as follows:

> The company is not liable for loss * * * if any subsequent insurance is effected in any other company unless and until the company assents thereto, or unless the company does not dissent in writing within two weeks after receiving written notice of the intention or desire to effect the subsequent insurance or does not dissent in writing after that time and before the subsequent or further insurance is effected.

Now Bourque's "Manitoba" policy by this condition, it is clear, was not *ipso facto* void by his taking subsequently a further insurance with the respondents, but only voidable if the Manitoba company chose to invoke that subsequent insurance with the respondents in avoidance of their liability.

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Suppose that the Manitoba company's policy had not the double insurance clause and was issued in the Province of Quebec, for instance, where there are no statutory conditions, but that they, the Manitoba company, would have been able to defeat Bourque's claim against them upon any other ground, say, for false representations made by Bourque when applying for the insurance with them, could the appellants recover against the respondents notwithstanding the double insurance clause in the respondent's policy? I do not think so. In that case, they would have lost their recourse against both companies, as, I think, they do in this case.

Then the words '*Je vais abandonner*' used by Bourque in his first letter to the respondents clearly import a representation that he, personally, was to do some act, something towards preventing a double insurance. And he never did anything, not even giving to the Manitoba the notice of his intention that his contract with them, as proved in this case, obliged him to give. Now having induced the respondents to contract with him upon such express condition that he would act and do something toward putting an end to his other policy, without which they would not have insured him and having entirely failed to conform to it, how his action against them can be maintained, I cannot see.

I remark further in this case, though it cannot affect the result, that, as I have already mentioned, it appears by this record that the appellants have recovered judgment against the Manitoba company for the amount of Bourque's policy with them.

They surely cannot themselves attack that judgment and contend that they were not entitled to it. Could any more cogent proof, as against them, be made of the double insurance pleaded by the respondents?

Can any better evidence be made by the respondents of the truth of their allegations? Of course, if their action against the Manitoba company had been dismissed on the ground that the respondents' policy, not that of the "Manitoba," was in force, that would be as to the respondents, *res inter alios*, and could not affect them in any way. But the fact that they have recovered judgment against the Manitoba company is, as against them, conclusive evidence of the fact that Bourque had a prior insurance at the time of the fire, though the event of the failure of his action against the Manitoba company could not have affected the result of this case. The appellants' reasoning on this point seems to me turning in a vicious circle, the inevitable result of not considering these two cases apart and independently of each other.

Could the court of Manitoba, in face of the evidence that a judgment against the Manitoba company had so been obtained by the appellants, a judgment which the appellants could not and do not impeach in this case, give them a judgment against the respondents. I fail to see any error whatever in the judgment appealed from at the time it was rendered, and nothing that may have happened since between Bourque and the Manitoba company (specially if not of record in this case) can affect our determination of the appeal. In my opinion the judgment appealed from is unassailable and I would dismiss the appeal with costs.

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SEDGEWICK J.—On the 12th July, 1900, one P. E. Bourque, residing at Altamont, Manitoba, insured his stock of goods in the Manitoba Assurance Co. for $2,500. The policy insuring the goods contained the usual statutory conditions together with a varied condition,

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should the assured desire, providing for its interim cancellation. That policy being then subsisting, on the 1st January, 1901, Bourque wrote to one J. T. Dumouchel, an agent of the Royal Insurance Co., a letter of which the following is a copy:

ALTAMONT, le 1er Janvier 1901.

M. J. DUMOUCHEL,

MONSIEUR,—Etant en train de me faire assuré contre le feu sur mon stock, ici à Altamont lorsque Mr Landry m'a prié de vous écrire comme étant assuré lui-même dans votre compagnie, j'ai pris une petite assurance l'été dernier lorsque j'ai acheté de M. Landry, dans la Manitoba Assurance Co. et comme il y a des gens qui pensent que c'est une compagnie faible. je vais abandonné. J'avais $2,000 sur stock, meubles, piano, etc. J'ai un stock audelà de $5,000, et je désirais de mettre a peu près $3,000 d'assurance.

Attendant votre retour, Je demeure votre, etc.,

P. E. BOURQUE.

Dumouchel had

full power to receive proposals for insurance against loss or damage by fire, to sign interim and renewal receipts—to receive moneys, and to do all lawful acts and business pertaining to such agency which might from time to time be given him in charge as said agent.

Dumouchel replied to this letter that he would be glad to have the insurance; that he knew nothing about the standing of the other company; but that his was a very strong one.

On the 5th January, 1901, Bourque wrote Dumouchel.

In answer to yours received yesterday, I beg to say I desire to insure the stock only and store fixtures included, dry goods, groceries, boots and shoes, furniture, for $3,000. I do not keep a stopping place.

Then follows a description of the building.

I think that this is the explanation necessary. If you desire anything further I will be pleased to furnish it to you.

Dumouchel thereupon wrote to Bourque that if he sent $75 for the premium he would "put through the insurance" for him. Bourque replied on the 6th of January that he could not pay the amount at once, but would do so later, in reply to which Dumouchel

on the morning of the 7th of January sent him an interim receipt for insuring the stock in trade for $3,000 from that date, and a promissory note payable to Dumouchel's order for $51, requesting him to sign the note and return it with a cheque for $25. This was done and the note was subsequently paid and the amount of the premium, less commission, sent by Dumouchel to the Royal Insurance Company's head office in Montreal which retained it. The interim receipt was as follows:

The Royal Insurance Company, No. 32513, St. Boniface Agency, 7th January, 1901. Mr. P. E. Bourque having this day applied for insurance against loss or damage by fire to the extent of $3,000 on the property described in application of this date for twelve months, *subject to the conditions as indorsed* hereon of the company's policy, and having also paid the sum of $75 as the premium for the same, the property is hereby held insured for forty-five days from this date or until a policy is sooner delivered or notice given that the application is declined. If the application is declined the premium received will be refunded on this receipt being given up, less the proportion for the time the risk has been covered.

N.B.—If a policy be not received before the expiration of the period above mentioned and no intimation has been given that the application is declined, immediate notice thereof should be given to the manager of the company in Montreal.

On general stock, Altamont, premium $75.

(Sgd.) JOS. DUMOUCHEL,
St. Boniface Agency.

Indorsed on the back were the statutory conditions without alterations or additions the eighth being as follows:

The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is indorsed hereon, nor if any subsequent insurance is effected in any other company, unless and until the company assents thereto, or unless the company does not dissent in writing within two weeks after notice of the intention or desire to effect the subsequent insurance has been mailed to them and addressed to their principal office in Manitoba by registered letter, or does not dissent in writing after that time and before the subsequent or further insurance is effected.

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Before the time mentioned in the interim receipt expired the property insured was burnt. He made claim by proofs of loss from both companies, but intended to recover only from that one which should ultimately appear to be liable, if either was liable. Both companies disputed liability and both were sued by R. J. Whitla & Co., to whom the assured has assigned his claim.

Upon trial of the two actions, Killam C. J. dismissed the action against the Royal Insurance Co. and gave judgment against The Manitoba Assurance Co. for the amount of the loss, which judgment was affirmed on appeal to the Court in Banc.

All parties against whom judgment was given appealed to this court, and the question to be determined is: Under the circumstances of this case, is either company liable and, if so, which?

I have, after some doubt, arrived at the conclusion that there is error in both the judgments of the court below, and that while the Manitoba Assurance Co. is not liable, the Royal Insurance Co. is.

So far as the Manitoba Assurance Co. is concerned it seems to me that there can be but little question as to its non-liability. The effecting of the new insurance in the Royal Co. without its assent gave it the right at its option to void it, and, as has been established by a long series of cases in Canadian courts, whether the new insurance was in the first event valid or invalid, if there was a new contract of insurance in fact, that *de facto* second insurance made void the first. Besides, for the reason presently to be pointed out, the company is discharged. The assured abandoned his claim under his contract in consideration of the Royal re-assuring him.

Before discussing the further facts in this case let me call attention to two principles of law which I

think may be found to determine the controversy here. "There is nothing," says a learned text writer,

> in the law to prevent parties, if they so think fit, from agreeing that, as between them, a certain fact, or state of facts, shall, for the purposes of a particular transaction, which it is competent for them to enter into, and into which they propose to enter, be taken to be true, whether it be in fact true or not, or although they know, or either of them knows, it to be untrue.

That is called estoppel by contract.

> The meaning of estoppel, says Martin B. is this : that the parties agree for the purpose of a particular transaction to state certain facts as true ; and that so far as regards that transaction there shall be no question about them.

In *Ashpitel* v. *Bryan* (1), Pollock C. B. says:

> For the purpose of the transaction in question the parties agreed that certain facts should be admitted to be facts, as the basis on which they would contract, and they cannot recede from that * * * We ll agree with the court below that there may arise an estoppel by agreement, and that such an estoppel arises here.

And in *McCance* v. *London & North Western Railway Co.* (2), Williams J. in delivering the judgment of the Exchequer Chamber says:

> Here it appears in evidence that the contract declared on was to be regulated and governed by a state of facts understood by the parties * * * It is laid down in my brother Blackburn's Treatise on the Contract of Sale, p. 163, that 'when parties have agreed to act upon an assumed state of facts, their rights between themselves are justly made to depend on the conventional state of facts, and not on the truth.' Applying that rule to the present case, we think that both parties are bound by the conventional state of facts agreed upon between them.

The other principle, that of election, which is perhaps a sub-class of the one just referred to, is to be found stated in the case *Scharf* v. *Jardine* (3) where Lord Blackburn makes reference to it as follows:

(1) 3 B. & S. 474 ; 5 B. & S. 723 ; 32 L. J., Q. B. 91 ; 33 L. J., Q. B. 328.

(2) 7 H. & N. 477 ; 3 H. & C. 343 ; 31 L. J. Ex. 65 ; 34 L. J. Ex. 39.

(3) 7 App. Cas. 360.

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Now on that question there are a great many cases; they are collected in the notes to *Dumpor's Case* (1) and they are uniform in this respect, that where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted, it is final and cannot be altered.

Lord Blackburn also refers to the case of *Jones* v. *Carter* (2) as most neatly stating the point.

> The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him: but so soon as he has not only determined to follow one of these remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.

The case, it seems to me, very largely depends upon the phrase "*Je vais abandonner*" in Bourque's letter of the 1st of January, 1901, to the Royal Insurance Co's agent at St. Boniface. That that letter was incorporated in and formed part of the contract evidenced by the interim receipt there can be no question.

Now, from a perusal of the correspondence and evidence and interim receipt, I draw several conclusions. The agent Dumouchel knew perfectly well of the then existing policy in the Manitoba Assurance Co. Both he and Bourque fully understood that there was no intention on Bourque's part to effect "other" or "additional" insurance in the Royal Insurance Co. There was no intention that there should be two existing insurances at the same time upon the property. Neither was it the intention that there should be any time when there should be no insurance upon it. The proposal in the letter of 1st January, in effect was

(1) 1 Sm. L.C. 11th ed. 35. (2) 15 M. & W. 718.

this: "I intend to abandon my insurance in the Manitoba Assurance Co. if I can obtain substituted insurance in the Royal Insurance Co. In other words —you insure me and I undertake to abandon my insurance in the Manitoba Assurance Co. and not to make any claim against it if loss occurs to me after you have insured me." The acceptance of the money of the assured and the signing of the interim receipt carried out the intention of both parties, and its effect was, as between the assured and the "Royal" Co., to destroy the right of the assured under the first policy, that is to say to annihilate it and to substitute in its stead the new assurance. The assured used the word "*abandonner*." As a matter of strict law it was impossible for him to abandon his contract with the "Manitoba" Co. without their assent. Under its special terms he might during its currency have cancelled it and claimed the unearned premium, but that would not be an act showing that he had abandoned the policy but living up to its terms and insisting upon the performance of its conditions in his favour, and Dumouchel must be presumed to have known this and that the acceptance by Bourque of the interim receipt and the payment of the premium in itself constituted the abandonment which both parties had in contemplation.

This is a suit that, before the modern practice, would have had to be brought in a Court of Equity and the relief sought for would have been a decree directing the company to issue a policy and as ancillary to that relief to pay the amount of the loss of the plaintiff. In that case the policy directed to issue would, in my judgment, contain a declaration that the insurance thereby effected was an insurance in substitution and in consequence of the abandonment by the assured of his rights under the "Manitoba" policy. Sup-

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pose a policy so ordered to be issued contained provision in words such as the following: "Whereas the applicant is now insured in the 'Manitoba' Co. and has declared that upon the effecting of an insurance in this company he abandons his right under the first policy; and whereas this company has agreed to such abandonment and to the issue of this policy under the circumstances aforesaid the company hereby assures etc., etc."; could it be contended that it nevertheless had a right to claim the "Manitoba" policy as an existing insurance upon the property? The words "other insurance" in the statutory conditions in that case would clearly not apply to the "Manitoba" policy but to any other existing insurance not disclosed to Dumouchel. It therefore seems to me the more reasonable view to hold that under all the circumstances of this case, while the "Manitoba" Co. were relieved from liability by reason of the substituted insurance, the "Royal" Co. was not relieved from its liability.

I am not disposed to place much reliance upon the fact that the assured proved a claim against both companies and sued both companies. He was on the horns of a dilemma. The proofs were made and the actions were commenced on the advice of his legal adviser. The very fact that there is now a difference of opinion as to which, if either, company is liable, or as to whether there is any liability at all, shews that perhaps the advice of the solicitor displayed good judgment. At the very most it is only evidence, not conclusive evidence, in proof of the allegation that he never did abandon his claim against the Manitoba Co. There is however no estoppel, and as I consider that the contract creating the second insurance was a valid contract effected for the purpose for which it was intended, and that there was not even a suspicion of fraud or of an intention to doubly insure, the subse-

quent conduct of the assured with regard to the proofs of loss cannot vary or in any way injuriously affect his rights.

On the whole I am of opinion that both appeals should be allowed and that judgment should be entered dismissing the action against the "Manitoba" Co. and that judgment should be entered against the "Royal" Co. Costs to the successful party in each case.

GIROUARD J. concurred.

DAVIES J.—Both during the argument of this case and since I have entertained serious doubts of the right of the plaintiffs to recover and I confess that even now these doubts are not entirely removed.

The plaintiffs sue as assignees of one Bourque who at a time when he was insured in the Manitoba Ass. Co. became dissatisfied with the stability of the company and applied to the agent of the Royal Ins. Co. for insurance upon practically the same property. In his application which was written in French he stated with respect to his existing insurance in the Manitaba Ass. Co. that

as there are people who think that it is a weak company I am going to abandon.

A few days afterwards in response to a letter from the agent of the "Royal" he furnished the necessary particulars to effect insurance, and afterwards paid the insurrance premium to the agent who remitted it to the head office of the company by which it has since been retained. The agent issued to Bourque an interim receipt with the statutory conditions indorsed thereon. The receipt says:

Mr. P. E. Bourque having this day applied for insurance against loss or damage by fire to extent of $3,000 on the property described in application of this date for 12 months, subject to the conditions as indorsed hereon of the company's policy and having also paid the sum of $75 as the premium, &c.

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In my opinion therefore, both Bourque's application and the indorsed conditions must be read into and form part of the contract. No question of fraud or of any attempt to insure doubly is raised. It is admitted that the intention was to substitute the insurance in the "Royal" for that in the "Manitoba." In fact Bourque's application specifically set out the existence of the insurance in the "Manitoba," and his intention to abandon it for that he was taking out in the "Royal"; and it was with full knowledge, therefore, of all the material facts that the latter insurance issued. The intention of the parties was clear that there should not be a moment of time when Bourque was not actually insured. He was not obliged to complete the abandonment of his insurance in the "Manitoba" company as a condition precedent to that effected in the Royal attaching. The latter company was willing to insure knowing of the existence of the other insurance, and to accept Bourque's statement that the insurance he was effecting was not intended as additional, but as substituted insurance. They knew that under the statutory conditions binding alike on the "Manitoba" Company as on themselves, a subsequent insurance by Bourque relieved the "Manitoba" company of any further liability, and with this knowledge and Bourque's statement of his intention to abandon the prior insurance, they effected substituted insurance for him. The 8th statutory condition which they invoke to relieve themselves of liability says:

> The company is not liable for loss if there is any prior insurance in any other company unless the company's assent thereto appears herein or is indorsed hereon, &c.

I doubt whether the insurance in the "Manitoba" which the "Royal" Company was expressly informed about in Bourque's application and as to which he stated his intention to abandon, can be held as "prior

insurance" within the meaning of those words in this condition. Those words evidently have reference to some prior insurance the existence of which the company effecting the second insurance might assent to. In other words, they refer either to an attempt to effect a second or double insurance without the company's knowledge, or to do so with their knowledge and assent, but in any case to some attempted or intended double assurance. Here was an honest attempt, not to obtain an assent to a declared prior insurance or to suppress the fact of a prior insurance existing, but to obtain substituted insurance in lieu of a declared prior insurance which was to be abandoned. If the true construction of the clause requires the assent even in the latter case which seems to me an illogical construction, I am still of the opinion that it does sufficiently appear in the interim receipt of which the application is made a part, and that it appears coupled with their acceptance of Bourque's promise to abandon, and that the failure of Bourque subsequently to carry out his intention of formally abandoning the "Manitoba" insurance cannot under the peculiar circumstances of this case defeat his claim against the "Royal" company.

The question, apart from the construction of the condition, seems to me to be whether this promise to abandon was a warranty or an antecedent condition to the policy attaching which would go to the root of the transaction or whether it is merely a collateral stipulation, the non-performance of which did not avoid the defendant company's obligat on, but only gave it a cause of action in case of breach with damage. I am of opinion that it was the latter.

It has been contended that Bourque by asserting in his proofs of loss the existence of the insurance in the "Manitoba" company has prevented his recovery in this

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action. But the circumstances must be looked to. It was very doubtful which policy would be held to be effective or indeed whether either of them would be. The subsequent judicial differences of opinion shew how well founded the doubts were. There was no intention to deceive any one by these proofs in the form in which they were made out, nor did they deceive anyone. It is unfortunate that they were worded as they were and that the facts were not set forth correctly. But no doubt the difficulties were great and in the absence of any fraud or attempted fraud I am disposed to agree with the contention that this irregularity or incorrect statement in the proofs should not be held to destroy an otherwise valid insurance.

NESBITT J. concurred.

Appeals allowed with costs.

Solicitors for the appellants, The Manitoba Assurance Co.: *Tupper, Phippen & Tupper.*

Solicitors for the respondents, Whitla *et al.*: *Macdonald, Haggart & Whitla.*

Solicitors for the appellants, Whitla *et al.*: *Macdonald, Haggart & Whitla.*

Solicitors for the respondents, The Royal Insurance Co.: *Munson & Allan.*