Alberta Supreme Court [Appellate Division]

21 D.L.R. 26

Nakata (Plaintiff), Respondent, v. The Dominion Fire Insurance Company (Defendant), Appellant

Harvey, C.J., Scott, Stuart and Simmons, JJ.

Judgment: March 26, 1915

Counsel: *C. T. Jones*, K.C., for plaintiff, respondent.
A. H. Clarke, K.C., and *J. M. Carson*, for defendant, appellant.

***Harvey, C.J.*, concurred with *Scott, J.*:**

***Scott, J.*:**

2 This is an appeal from the judgment of Beck, J., in favour of the plaintiff for the amount of a policy of insurance issued to her by the defendant.

3 The grounds of appeal relied upon by defendant company are: — (1) That the premium upon the policy had not been paid by the plaintiff; and (2) that the defendant company had cancelled under the powers contained in it.

4 On the 30th of January, 1913, plaintiff's husband applied, on her behalf, to one Carr, the agent of another insurance company, for insurance upon the property comprised in the policy in question. Carr informed him that his company would not accept the risk, but he then offered to endeavour to place it with another company, and he was instructed to do so. On the same day he applied to Tavender & Co., the defendant company's general agents at Calgary, who accepted the application, and on that day issued the policy and delivered it to him. He had received $10 from the plaintiff's husband on account of the premium, and on 8th of February the latter paid him $70, being the balance of the premium, and received the policy.

5 The premium of $80 was not paid by Carr to Tavender & Co. in actual cash, but there appear to have been numerous dealings between them with respect to premiums on other insurance negotiated by him for defendant company, and there was a running account kept by Tavender & Co. in their ledger, in which he was charged with the premiums and credits given him from time to time for payments made by him on account and for his commissions upon the premiums. In that ledger account he is charged with the amount of plaintiff's premium ($80) and credited with his commission thereon ($12).

6 Carr may have been the agent of the plaintiff for the purpose of placing the insurance with the defendant company, but, in my view, the evidence clearly establishes that from the time it was placed he was the agent of the latter. He was so styled upon the policy when it was issued. In a letter from Tavender & Company to defendant company's head office, on the 10th of February, respecting plaintiff's insurance, he is referred to as its sub-agent, and in a letter from Tavender & Company to him on the 8th of February, which I will refer to later, he is, in effect, instructed to take the necessary steps to cancel plaintiff's policy.

7 The facts I have stated appear to me to be sufficient to charge the defendant company with receipt of plaintiff's premium. Even if the receipt of it by Carr is not in itself sufficient, the course of dealing between himself and Tavender & Company was such as to charge the latter with its receipt.

8 One of the conditions of the policy is as follows: —

> 19. The insurance may be terminated by the company by giving notice to that effect, and, if on the cash plan, by tendering therewith a ratable proportion of the premium for the unexpired term, calculated from the termination of the notice; in the case of personal service of the notice, five days' notice excluding Sunday, shall be given. Notice may be given by any company registered under the provisions of Foreign Companies' Ordinance and having an agency in the Territories, by registered letter addressed to the assured at his last post office address notified to the company, and where no address notified, then to the post office of the agency from which application was received, and where such notice is by letter, then ten days from the arrival at any post office in the Territories shall be deemed good notice. And the policy shall cease after such tender and notice aforesaid, and the expiration of the five or ten days, as the case may be.
>
> (*a*) The insurance, if for cash, may also be terminated by the assured by giving written notice to that effect to the company, or its authorized agent, in which case the company may retain the customary short rate for the time the insurance has been in force, and shall repay to the assured the balance of the premium paid.

9 Upon issuing the policy, Tavender & Company at once notified the head office of defendant company, and on the 4th of February the latter wrote them, asking for further information about the risk and suggesting that the policy should be cancelled. On the 8th of February Tavender & Company wrote Carr, as follows, respecting it: —

> As advised you by telephone to-day, the head office have asked for immediate cancellation of above policy. Kindly arrange to let us have this by return mail and very much oblige.

10 On the 8th of February Carr sent the following notice to the plaintiffs at Calgary by registered mail: —

> Please take notice that your policy of insurance No. 13278 of the Dominion Fire Insurance Company, covering for $2,000, on sporting house, is cancelled on the 8th of February, and will not be in force after that date. I have to request the return of the above number policy of insurance.
>
> H. Carr, Agent.

11 On the 10th of February Carr wrote Tavender & Company as follows: —

> I am in receipt of your favour of the 8th inst. with reference to the cancellation of the above numbered policy. I have sent a registered letter to the insured cancelling same on February 8, and requesting the return of the policy here for cancellation.
>
> H. Carr, Agent.

12 No tender was made by either the defendant company or Carr to the plaintiff of the proportion of the premium for the unexpired portion of the term; nor was any offer made to her, either directly or indirectly, to return her any portion of the premium. Carr, however, states that on the 30th of January, after Tavender & Company had accepted the application, he told plaintiff's husband that the policy might be cancelled, and asked the latter whether in such case he (Carr) should return the money or retain it and place the insurance in some other company, and that the latter told him to place it in another company. The latter denies that anything was said to that effect. Carr also states that he endeavoured to place the insurance elsewhere, but he was unable to procure another company to accept it. The plaintiff did not receive the notice of cancellation nor did she become aware of it until after the fire, which took place on the 22nd of May following.

13 Although Tavender & Company received notice from Carr on the 10th of February that he had cancelled the policy, it was not until the 22nd of March, some six weeks afterwards, that they credited his account with the amount of plaintiff's premium and debited him with the amounts of his commission thereon.

14 It is, in my view, open to serious doubt whether the notice of cancellation given by Carr is one within the conditions referred to. The condition provides that where, as in this case, the notice is sent by registered mail, the policy shall cease at the expiration of ten days from the giving of the notice, whereas the notice given by Carr expressly states that the policy shall not be in force after the date of the notice. It, therefore, plainly discloses the intention to cancel it in a manner not authorized by the condition, and it is, at least, open to question whether the defendant company should be held entitled to rely upon it as a notice of cancellation in the authorized manner.

15 Even if the notice were held to be sufficient for the purpose, I am of opinion that, by reason of the fact that no tender was made by either defendant company or Carr of the portion of the premium to which plaintiff was entitled or any offer made by either to account to her for same, the insurance was not terminated. Even if Carr's statement to the effect that he was authorized to hold the money for the purpose of procuring insurance in another company is accepted, the defendant company would not thereby be relieved from the necessity of making the tender, or, at least, of causing her to be notified that the portion of the premium to which she was entitled was held at her disposal. The effect of Carr's statement is that he occupied the dual position of defendant company's agent to terminate the insurance and of plaintiff's agent to receive the moneys to which she was entitled. It was, therefore, not only his duty at least to notify her that the money was held at her disposal, but it was also the duty of defendant company either to see that she was so notified or that the money was returned to her. Had she received the notice, there was nothing to lead her to any other conclusion than that defendant company had not only terminated the insurance, but also intended to retain the whole of the premium paid by her.

16 The appeal should be dismissed with costs.

17 STUART, J., concurred with SCOTT, J.

***Simmons, J.*:**

18 The plaintiff sued the defendant company for $1,700 on an insurance policy, dated January 31, 1913, insuring the plaintiff's house and contents for $2,000. The plaintiff claims the premises were destroyed by fire on May 22, 1913, while the said policy was in force.

19 The defendant company sets up as defences: —

20 (*a*) The policy is void, as the premises were described in the policy as "a sporting house," and were used as a bawdy house.

21 (*b*) The premium had not been paid, and this was a condition precedent to the coming into effect of the policy; and

22 (*c*) The said policy was cancelled by the defendant company prior to May 22, 1913, when the premises were destroyed.

23 The learned trial Judge found as a fact that the premium had been paid, and that there had not been a cancellation of the policy.

24 Following *Morin v. Anglo-Canadian Fire Insurance Company*, 13 W.L.R. 667, a decision of the Court of Appeal of this province, the learned trial Judge refused to give effect to the defence that the contract was void on the ground of immorality. From this judgment the defendant appeals.

25 E. F. L. Tavender Company, Limited, was the agent of the defendant company at Calgary. One H. Carr was an insurance broker at Calgary, who, at various times in the course of business, sent to Tavender & Company, Limited, applications for insurance from his clients, when the company or companies represented by Carr could not accept the risks.

26 The defendant company had a policy of insurance on the property in question in favour of a former owner, and which would expire on February 5, 1913.

27 The plaintiff's husband brought this policy to Carr, who had the same cancelled, and took an application for the policy in question, and was paid $10 on account of the premium. The property in question was used by the owner as a bawdy house, and was described in the application for insurance and in the policy issued by the defendants as "a sporting house."

28 On the 8th of February, 1913, the plaintiff's husband paid the said Carr $70, which was the balance due from the plaintiff for the premium, and Carr delivered to him the policy in question.

29 On the 4th of February, 1913, the company, from their head office in Toronto, wrote their agents, Tavender & Company, Limited, at Calgary, making inquiries about the property insured, and suggesting that if the property was not "under absolute police protection," they would consider the agent was not treating them fairly, if he did not cancel the business at once.

30 On February the 8th, subsequent to the payment to Carr of the balance of the premium and delivery of the policy by him to the plaintiff's husband, Tavender Company, Limited, telephoned Carr asking him to cancel the policy and return it to them, and also wrote Carr on the same day, confirming the telephone message. Carr thereupon wrote the plaintiff, the same

day, advising her that the policy was cancelled on that date, and requested her to return to him the said policy. The letter was registered, but was not delivered to the plaintiff, and was returned through the Post Office to Carr on March 1, 1913.

31 Mr. Massie, president of the defendant company, says that Carr never was the agent of the company; and that Tavender & Company, Limited, had authority to issue policies, but that in regard to this class of risk, this authority was limited to the extent that the policies "were subject to acceptance or being declined by the head office." Massie says the company had not received the premium, but that the non-payment of premium had nothing to do with cancellation of the risk.

32 Carr says he had for some years a standing account with Tavender & Company, Limited, for insurance turned in by him as a broker, and the premium in question went through in the ordinary way.

33 The page of Tavender & Company, Limited, ledger, ex. 12, is the account from December 2, 1911, until September 1, 1913, and shews a debit to Carr, on February 14, 1913, of $80, and a credit of $12 on account of the policy in question, and on March 27 a credit of $12 and a debit of $80.

34 On January 31, 1913, the date on which the policy issued, Carr is credited with 94c. and debited with 16c. on account of $1.10 rebate on the insurance policy on the same property, which was cancelled on that date. The defendants wrote Carr instructing him to cancel the policy. These instructions carried with them the burden of performing the necessary things provided by the contract in order to effect cancellation. They had, in the course of business, charged Carr with the premium. They did not put Carr in funds to repay the premium and they did not indicate to him that they would make a cross entry in their books crediting him back with the premium less the commission, and they made no such cross entry until March 27, 1913.

35 Mr. Campbell, then in charge of the office of Tavender & Company, Limited, says: —

> At the time the policies are issued, we make an entry charging the broker with the amount of the premium less the commission.

In the result, then, Carr was not even in a position to hold the premium for the plaintiff, pending re-insurance, as the effect of the account, having regard to the course of business between Carr and Tavender & Company, Limited, was that the same had been paid by Carr to Tavender & Company, Limited.

36 Between December, 1911, and September, 1913, payments in cash by Carr on this account occurred three times only, namely, December 12, 1911, March 6, 1912, and May 22, 1913, the last being the only one that squared the account.

37 In view of this account and the evidence of the course of business between Tavender & Company, Limited, and Carr, the finding of the trial Judge is absolutely correct, as to the payment of the premium to Tavender & Company, Limited, by Carr: *Bell v. Hudson Bay Insurance Company*, 44 S.C.R. 419.

38 It was not repaid to Carr — that is, the premium, less $12 commission, was not credited back to Carr until March 27,

and Carr is debited with a balance of $67.06, which was balanced by a cash entry of $67.06 on May 22.

39 Carr says that when he took the application, the plaintiff's husband was told that it was subject to cancellation, and that he was authorized to retain the premium for the purpose of replacing the policy in another company, and that he failed to get another company to accept it. There is no evidence that he communicated this to Tavender & Company, Limited, at the time the policy was issued, or up to February 8, when the notice of cancellation was sent. Carr does say that he had conversation with Tavender & Company, Limited, about the time that the fire took place, in regard to getting the policy back, and that he told Mr. Campbell, a member of the firm of Tavender & Company, Limited, that the money was in his hands waiting for the plaintiff to call for it.

40 The statutory conditions endorsed on the policy are the statutory conditions in force in this province: ch. 113, Con. Ord., N.W.T.; and sec. 19 prescribed the method by which a policy may be terminated. A tender of the ratable proportion of the unexpired premium must accompany the notice, which, in the case of a foreign company registered in the province, may be made by registered letter addressed to the assured at his last post office address notified to the company, and, in the absence of such, then addressed to the post office of the agency from which the application was received, and which notice shall take effect ten days after arrival at such post office, and the policy shall cease after such tender and notice as aforesaid.

41 Even if assumed, in favour of the defendant company, that Carr was agent of the assured for the purpose of receiving notice of cancellation, failure to tender to Carr the unearned premium, or to credit him with it at the time, is fatal to their attempted notice through Carr of cancellation.

42 I do not think there is any valid ground, however, for questioning the finding of the learned trial Judge to the effect that Carr was not the agent of the assured for the purpose of receiving notice and tender pursuant to sec. 19.

43 An intention on the part of one of the parties not communicated to the other party cannot alter the construction of a contract aside from its effect as to fraud or mistake: *Reliance Marine Insurance Company v. Duder* (1913), 1 K.B.D. 265, 81 L.J.K.B. 870, 106 L.T. 936, 28 T.L.R. 469, 12 Asp. M.C. 223, 17 Com. Cas. 227.

44 What took place between Carr and the husband of the assured in regard to any such arrangement was not communicated (if at all) at least until after the 8th of February, and the defendant cannot rely upon it as affecting the rights of the parties.

45 The defence that the policy was void on the ground that the contract was an immoral one is governed by *Morin v. Anglo-Canadian Fire Ins. Co., supra*, and therefore fails.

Appeal dismissed with costs.

Solicitors of record:
Jones, Pescod & Adams, solicitors for plaintiffs, respondents.
Clarke, Carson & MacLeod, solicitors for defendant, appellant.

Dominion Law Reports

CITED "D.L.R."

COMPRISING EVERY CASE REPORTED IN THE COURTS OF EVERY PROVINCE, AND ALSO ALL THE CASES DECIDED IN THE SUPREME COURT OF CANADA, EXCHEQUER COURT, THE RAILWAY COMMISSION, AND THE CANADIAN CASES APPEALED TO THE PRIVY COUNCIL

ANNOTATED

For Alphabetically Arranged Table of Annotations to be found in Vols. I-XXI D.L.R., See Pages vii-xvi.

VOL. 21

EDITED BY
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EDWIN BELL

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MAN.

K. B.

MOLISON v. WOODLANDS

Having arrived at this conclusion, I have not considered the objections raised as to lack of parties.

The plaintiffs' action will be dismissed with costs.

Action dismissed.

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S. C.

NAKATA v. DOMINION FIRE INSURANCE CO.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart and Simmons, JJ. March 26, 1915.

1. INSURANCE (§ III C—56)—FIRE INSURANCE—CANCELLATION—NOTICE OF—RETURN OF PREMIUM.

In order to validly cancel its policy of fire insurance under statutory condition No. 19, Con. Ord., N.W.T., ch. 113, the insurance company must not only send notice to the assured, but tender him the unearned premium; even if the company's sub-agent had previously been authorized by the assured to hold the money for the purpose of procuring insurance elsewhere in the event of the company cancelling, the company would not be relieved from the necessity of making the tender or at least of causing him to be notified that the portion of the premium to which he was entitled was held at his disposal.

2. INSURANCE (§ VI E—400)—LOSS BY FIRE—BAWDY-HOUSE—RIGHT OF RECOVERY—DEFENCE OF ILLEGALITY.

A fire insurance company cannot set up public morals as a defence to a claim under its policy issued upon premises described therein as a "sporting house" and used as a bawdy-house.

[*Morin* v. *Anglo-Canadian*, 3 A.L.R. 121, applied.]

Statement

APPEAL from the judgment of BECK, J., in favour of the plaintiff for the amount of a policy of insurance.

C. T. Jones, for the plaintiff (respondent).

A. H. Clarke, for defendant company (appellants).

Harvey, C.J.

HARVEY, C.J., agreed with SCOTT, J.

Scott, J.

SCOTT, J.:—The grounds of appeal relied upon by defendant company are: (1) That the premium upon the policy had not been paid by the plaintiff; and (2) that the defendant company had cancelled under the powers contained in it.

On January 30, 1913, plaintiff's husband applied, on her behalf, to one Carr, the agent of another insurance company, for insurance upon the property comprised in the policy in question. Carr informed him that his company would not accept the risk, but he then offered to endeavour to place it with another company, and he was instructed to do so. On the same day he applied to Tavender & Co., the defendant company's general agents at Calgary, who accepted the application, and on that

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NAKATA v. DOMINION FIRE INS. CO.

Scott, J.

day issued the policy and delivered it to him. He had received $10 from the plaintiff's husband on account of the premium, and on February 8 the latter paid him $70, being the balance of the premium, and received the policy.

The premium of $80 was not paid by Carr to Tavender & Co. in actual cash, but there appear to have been numerous dealings between them with respect to premiums or on other insurance negotiated by him for defendant company, and there was a running account kept by Tavender & Co. in their ledger, in which he was charged with the premiums and credit given him from time to time for payments made by him on account and for his commissions upon the premiums. In that ledger account he is charged with the amount of plaintiff's premium ($80), and credited with his commission thereon ($12).

Carr may have been the agent of the plaintiff for the purpose of placing the insurance with the defendant company, but, in my view, the evidence clearly establishes that from the time it was placed he was the agent of the latter. He was so styled upon the policy when it was issued. In a letter from Tavender & Co. to defendant company's head office, on February 10, respecting plaintiff's insurance, he is referred to as its sub-agent, and in a letter from Tavender & Co. to him on February 8, which I will refer to later, he is, in effect, instructed to take the necessary steps to cancel plaintiff's policy.

The facts I have stated appear to me to be sufficient to charge the defendant company with receipt of plaintiff's premium. Even if the receipt of it by Carr is not in itself sufficient, the course of dealing between himself and Tavender & Co. was such as to charge the latter with its receipt. One of the conditions of the policy is as follows:—

> 19. The insurance may be terminated by the company by giving notice to that effect, and, if on the cash plan, by tendering therewith a ratable proportion of the premium for the unexpired term, calculated from the termination of the notice; in the case of personal service of the notice, excluding Sunday, shall be given. Notice may be given by any company registered under the provisions of Foreign Companies' Ordinance and having an agency in the Territories, by registered letter addressed to the assured at his last post office address notified to the company, and where no address notified, then to the post office of the agency from which application was received, and where such notice is by letter, then ten days from the arrival at any post office in the Territories shall be deemed good notice. And the policy shall cease after such tender and notice aforesaid, and the expiration of the five or ten days, as the case may be.

(a) The insurance, if for cash, may also be terminated by the assured by giving written notice to that effect to the company, or its authorized agent, in which case the company may retain the customary short rate for the time the insurance has been in force, and shall repay to the assured the balance of the premium paid.

Upon issuing the policy, Tavender & Co. at once notified the head office of defendant company, and on February 4 the latter wrote them, asking for further information about the risk and suggesting that the policy should be cancelled. On February 8 Tavender & Co. wrote Carr, as follows, respecting it:—

As advised you by telephone to-day, the head office have asked for immediate cancellation of above policy. Kindly arrange to let us have this by return mail and very much oblige.

On February 8 Carr sent the following notice to the plaintiffs at Calgary by registered mail:—

Please take notice that your policy of insurance, No. 13278, of the Dominion Fire Insurance Company, covering for $2,000 on sporting house, is cancelled on the 8th February, and will not be in force after that date. I have to request the return of the above number policy of insurance.

H. CARR, Agent.

On February 10 Carr wrote Tavender & Co. as follows:—

I am in receipt of your favour of the 8th inst. with reference to the cancellation of the above-numbered policy. I have sent a registered letter to the insured cancelling same on February 8th and requesting the return of the policy here for cancellation.

H. CARR, Agent.

No tender was made by either the defendant company or Carr to the plaintiff of the proportion of the premium for the unexpired portion of the term; nor was any offer made to her, either directly or indirectly, to return her any portion of the premium. Carr, however, states that on January 30, after Tavender & Co. had accepted the application, he told plaintiff's husband that the policy might be cancelled, and asked the latter whether, in such case, he (Carr) should return the money or retain it, and place the insurance in some other company, and that the latter told him to place it in another company. The latter denies that anything was said to that effect. Carr also states that he endeavoured to place the insurance elsewhere, but he was unable to procure another company to accept it. The plaintiff did not receive the notice of cancellation nor did she become aware of it until after the fire, which took place on May 22 following.

Although Tavender & Co. received notice from Carr on February 10 that he had cancelled the policy, it was not until March 22, some six weeks afterwards, that they credited his account with the amount of plaintiff's premium and debited him with the amounts of his commission thereon.

It is, in my view, open to serious doubt whether the notice of cancellation given by Carr is one within the conditions referred to. The condition provides that where, as in this case, the notice is sent by registered mail, the policy shall cease at the expiration of ten days from the giving of the notice, whereas the notice given by Carr expressly states that the policy shall not be in force after the date of the notice. It, therefore, plainly discloses the intention to cancel it in a manner not authorized by the condition, and it is, at least, open to question whether the defendant company should be held entitled to rely upon it as a notice of cancellation in the authorized manner.

Even if the notice were held to be sufficient for the purpose, I am of opinion that, by reason of the fact that no tender was made by either defendant company or Carr of the portion of the premium to which plaintiff was entitled or any offer made by either to account to her for same, the insurance was not terminated. Even if Carr's statement to the effect that he was authorized to hold the money for the purpose of procuring insurance in another company is accepted, the defendant company would not thereby be relieved from the necessity of making the tender, or, at least, of causing her to be notified that the portion of the premium to which she was entitled was held at her disposal. The effect of Carr's statement is that he occupied the dual position of defendant company's agent to terminate the insurance and of plaintiff's agent to receive the moneys to which she was entitled. It was, therefore, not only his duty, at least, to notify her that the money was held at her disposal, but it was also the duty of defendant company either to see that she was so notified, or that the money was returned to her. Had she received the notice, there was nothing to lead her to any other conclusion than that defendant company had not only terminated the insurance, but also intended to retain the whole of the premium paid by her.

The appeal should be dismissed with costs.

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STUART, J., agreed with SCOTT, J.

SIMMONS, J.:—The plaintiff sued the defendant company for $1,700 on an insurance policy, dated January 31, 1913, insuring the plaintiff's house and contents for $2,000. The plaintiff claims the premises were destroyed by fire on May 22, 1913, while the said policy was in force.

The defendant company sets up as defences:—

(a) The policy is void as the premises were described in the policy as "a sporting house," and were used as a bawdy-house. (b) The premium had not been paid, and this was a condition precedent to the coming into effect of the policy; and (c) the said policy was cancelled by the defendant company prior to May 22, 1913, when the premises were destroyed.

The learned trial Judge found as a fact that the premium had been paid, and that there had not been a cancellation of the policy.

Following *Morin* v. *Anglo-Canadian Fire Ins. Co.*, 3 A.L.R. 121, a decision of the Court of Appeal of this province, the learned trial Judge refused to give effect to the defence that the contract was void on the ground of immorality. From this judgment the defendant appeals. E. F. L. Tavender Co., Ltd., was the agent of the defendant company at Calgary. A. H. Carr was an insurance broker at Calgary, who, at various times in the course of business, sent to Tavender & Co., Ltd., applications for insurance from his clients, when the company or companies represented by Carr could not accept the risks.

The defendant company had a policy of insurance on the property in question in favour of a former owner, and which would expire on February 5, 1913. The defendant's husband brought this policy to Carr, who had the same cancelled, and took an application for the policy in question, and was paid $10 on account of the premium. The property in question was used by the owner as a bawdy house, and was described in the application for insurance and in the policy issued by the defendants as "A Sporting House." On February 8, 1913, the plaintiff's husband paid the said Carr $70, which was the balance due from the plaintiff for the premium, and Carr delivered to him the policy in question. On February 4, 1913, the company, from their head office in Toronto, wrote their agents, Tavender & Co., Ltd., at Calgary, making inquiries about the property insured, and suggesting that, if the property was not "Under absolute police protection," they would consider the agent was not treating them fairly, if he did not cancel the business at once.

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On February 8, subsequent to the payment to Carr of the balance of the premium and delivery of the policy by him to the plaintiff's husband, Tavender & Co., Ltd., telephoned Carr, asking him to cancel the policy and return it to them, and also wrote Carr on the same day confirming the telephone message. Carr thereupon wrote the plaintiff, the same day, advising her that the policy was cancelled on that date, and requested her to return to him the said policy. The letter was registered, but was not delivered to the plaintiff, and was returned through the post office to Carr on March 1, 1913.

Mr. Massie, president of the defendant company, says that Carr never was the agent of the company; and that Tavender & Co., Ltd., had authority to issue policies, but that, in regard to this class of risk, his authority was limited to the extent that the policies "were subject to acceptance or being declined by the head office." Massie says the company had not received the premium, but that the non-payment of premium had nothing to do with cancellation of the risk. Carr says he had for some years a standing account with Tavender & Co., Ltd., for insurance turned in by him as a broker, and the premium in question went through in the ordinary way.

The page of Tavender & Co., Ltd., ledger, ex. "12" is the account from December 2, 1911, until September 1, 1913, and shews a debit to Carr, on February 14, 1913, of $80, and a credit of $12 on account of the policy in question, and on March 27 a credit of $12 and a debit of $80.

On January 31, 1913, the date on which the policy issued, Carr is credited with 94c. and debited with 16c. on account of $1.10 rebate on the insurance policy on the same property, which was cancelled on that date. The defendants wrote Carr instructing him to cancel the policy. These instructions carried with them the burden of performing the necessary things provided by the contract in order to effect cancellation. They had, in the course of business, charged Carr with the premium. They did not put Carr in funds to repay the premium, and they did not indicate to him that they would make a cross entry in their books crediting him back with the premium less the commission, and they made no such cross entry until March 27, 1913.

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Mr. Campbell, then in charge of the office of Tavender & Co., Ltd., says:—"At the time the policies are issued, we make an entry charging the broker with the amount of the premium less the commission." In the result, then, Carr was not even in a position to hold the premium for the plaintiff, pending re-insurance, as the effect of the account, having regard to the course of business between Carr and Tavender & Co., Ltd., was that the same had been paid by Carr to Tavender & Co., Ltd.

Between December, 1911, and September, 1913, payments in cash by Carr on this account occurred three times only—namely, December 12, 1911; March 6, 1912; and May 22, 1913, the last being the only one that squared the account. In view of this account and the evidence of the course of business between Tavender & Co., Ltd., and Carr, the finding of the trial Judge is absolutely correct, as to the payment of the premium to Tavender & Co., Ltd., by Carr: *Bell* v. *Hudson Bay Ins. Co.*, 44 Can. S.C.R. 419.

It was not repaid to Carr—that is, the premium less $12 commission was not credited back to Carr until March 27—and Carr is debited with a balance of $67.06, which was balanced by a cash entry of $67.06 on May 22.

Carr says that, when he took the application, the plaintiff's husband was told that it was subject to cancellation, to retain the premium for the purpose of replacing the policy in another company, and that he failed to get another company to accept it. There is no evidence that he communicated this to Tavender & Co., Ltd., at the time the policy was issued, or up to February 8, when the notice of cancellation was sent. Carr does say that he had conversation with Tavender & Co., Ltd., about the time that the fire took place, in regard to getting the policy back, and that he told Mr. Campbell, a member of the firm of Tavender & Co., Ltd., that the money was in his hands, waiting for the plaintiff to call for it.

The statutory conditions endorsed on the policy are the statutory conditions in force in this province, ch. 113, Con. Ord. N.W.T., and sec. 19 prescribed the method by which a policy may be terminated. A tender of the ratable proportion of the unexpired premium must accompany the notice, which, in the case of a foreign company registered in the province, may be made by registered letter addressed to the assured at his last post office

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address, notified to the company, and, in the absence of such, then addressed to the post office of the agency from which the application was received, and which notice shall take effect ten days after arrival at such post office, and the policy shall cease after such tender and notice as aforesaid.

Even if assumed, in favour of the defendant company, that Carr was agent of the assured for the purpose of receiving notice of cancellation, failure to tender to Carr the unearned premium, or to credit him with it at the time, is fatal to their attempted notice through Carr of cancellation.

I do not think there is any valid ground, however, for questioning the finding of the learned trial Judge to the effect that Carr was not the agent of the assured for the purpose of receiving notice and tender pursuant to sec. 19.

An intention on the part of one of the parties not communicated to the other party cannot alter the construction of a contract aside from its effect as to fraud or mistake: *Reliance Marine Ins. Co.* v. *Duder*, [1913] 1 K.B. 265.

What took place between Carr and the husband of the assured in regard to any such arrangement was not communicated (if at all) at least until after February 8, and the defendant cannot rely upon it as affecting the rights of the parties.

The defence that the policy was void on the ground that the contract was an immoral one is governed by *Morin* v. *Anglo-Canadian Fire Ins. Co.*, *supra*, and, therefore, fails. I would dismiss the appeal.

Appeal dismissed.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin and Brodeur, JJ. February 2, 1915.

1. DEDICATION (§ I A—3)—MODE AND EFFECT—ANIMUS DEDICANDI—PUBLIC USER—EFFECT.

In order to constitute a valid dedication to the public of a highway by the owner of the soil there must be an *animus dedicandi* of which the use by the public is merely some evidence; public user does not create a presumption of grant or dedication.

[*Mann* v. *Brodie*, 10 A.C. 378, 386, applied; *Rowland* v. *Edmonton*, 20 D.L.R. 36, reversed.]

2. DEDICATION (§ I C—15)—BY MUNICIPALITY—PRESUMPTIONS — BUILDING HIGHWAY.

The spending of a sum of money by the government and the municipality on the plaintiff's land by building a highway wider than the authorized or reserved width and so encroaching on the plaintiff's land does not create a presumption *juris et de jure* in favour of dedication, even if acquiesced in by the owner.

[*Rowland* v. *Edmonton*, 20 D.L.R. 36, reversed.]