defendants' servants engaged in the operation of the mine and that even if there was a neglect of the duty imposed by statute, in respect to inspection of the machinery, as the accident occurred in consequence of the negligence of one of his fellow-servants, the defendants were excused from liability on the ground of common employment. Appeal dismissed with costs.

Shepley, K.C., for appellant. *Davis*, K.C., for respondent.

Man.] WHITLA *v.* MANITOBA ASSURANCE CO. [Nov. 30, 1903.

WHITLA *v.* ROYAL INSURANCE CO.

Fire insurance—Condition of policy—Double insurance—Application—Representation—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 the 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 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