

celled and surrendered by a written request from the assured to cancel, sent by mail before, but not received by the defendants until after, the fire.

The facts are fully stated in the former report of the case, and it is, therefore, unnecessary to repeat them here.

An argument addressed to us by the learned counsel for the defendants, apparently for the first time, or at all events not referred to in the judgment as reported, was that the plaintiffs had, in addition to the statutory right of surrender and cancellation, a similar common law right, and that if they had not well executed their statutory right they had at least executed the alleged common law right, by executing and mailing the written surrender and cancellation on 30th May. But granting the common law right to disclaim and renounce at any time a benefit which is unaccompanied by any corresponding burden or duty, it seems a complete answer to say that as a matter of fact there is no evidence upon which to found such an argument. There was no absolute cancellation and surrender on 30th May. What was done on that day was at most conditional, or, in other words, preparatory to a desired cancellation to take place on 5th June. The indorsement must be read with the letter which accompanied it, in which the plaintiffs say, "We desire to cancel as of June 5th."

It would, it appears to me, be a wholly unwarrantable liberty to take both with the documents, and the plain intention, to read the indorsement itself as amounting to an immediate cancellation as of 30th May. It is quite apparent that the plaintiffs intended to continue to be insured under the policy until 5th June, and equally apparent that from that date they intended to claim a refund of the unearned premium, a right which could not have been claimed except under the statute.

And this was the view of the defendants themselves when framing their statement of defence, that is, that the plaintiffs were proceeding in what they did under the statutory conditions, and not in the assertion of any common law right.

The real question must, therefore, I think, continue to be, did what took place amount to a statutory surrender and cancellation at the instance of the insured, so as to put an end to the policy before the fire?—a question, which has been answered, I think properly, in the negative, by the learned Judge at the trial, in a careful and well reasoned judgment, which, in my opinion, leaves very little to be usefully said.

This case is not, in my opinion, to be distinguished from the case of *Crown Point Iron Co. v. Aetna Insurance Co.*, 127 N. Y. St., a unanimous judgment of the State Court of Appeals, reversing the considered judgment of the State Su-