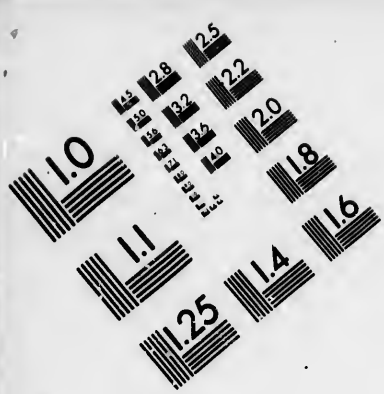

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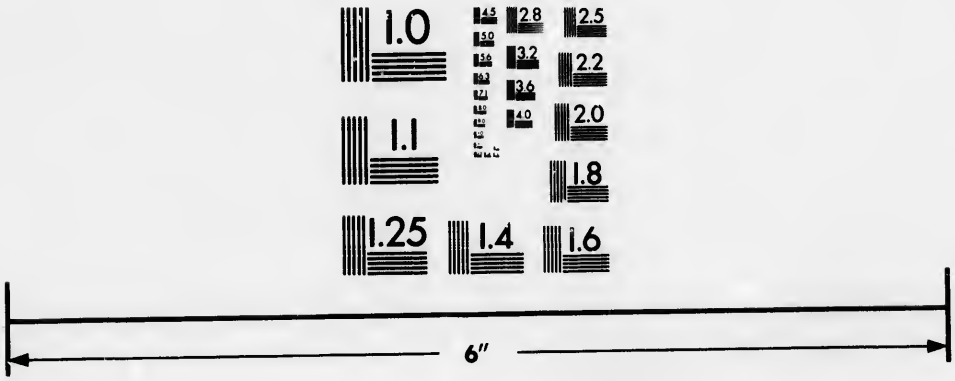

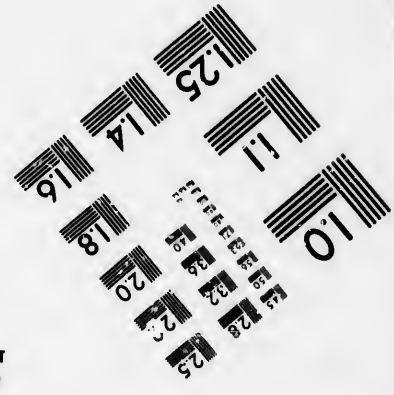

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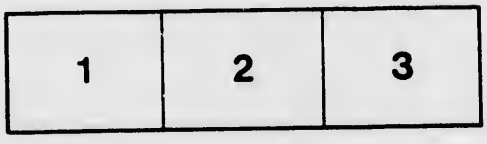

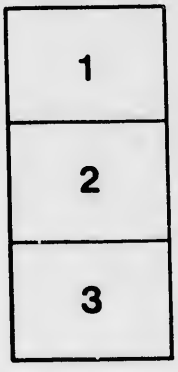

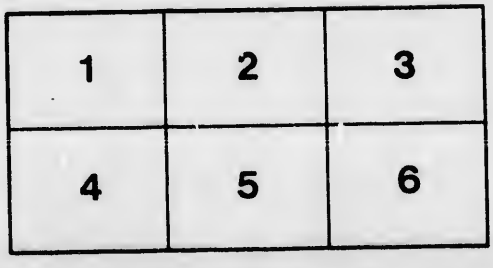

No 58.

QUEEN'S BENCH,

LOWER CANADA.

APPEAL SIDE.

JOHN CHALMERS,

Appellant,

AND

The Mutual Fire Insurance Company of Stanstead and Sherbrooke Counties,

Respondents.

APPELLANT'S CASE.

THOMAS W. RITCHIE FOR APPELLANTS.

№ 58.

QUEEN'S BENCH

Province of Canada,
LOWER CANADA, TO WIT:

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

JOHN CHALMERS,
(Plaintiff in the Court below,)
APPELLANT.

AND

The Mutual Fire Insurance Company of Stanstead and Sherbrooke Counties,
(Defendants in the Court below,)
RESPONDENTS.

APPELLANT'S CASE.

THE action of the Appellant, Plaintiff, in the Court below, was brought in the Superior Court, at Sherbrooke, to recover the sum of £375, amount of a policy of insurance granted by the Respondents in his favor, and dated March 24th 1854. The action was returned into Court, on the 18th day of March, 1856.

The declaration, after alleging the existence of the Insurance Company, as a body politic and corporate, authorised by law to effect insurances against loss or damage by fire, sets up the Policy granted by Respondents to Appellant on the 24th day of March 1854, insuring the sum of £375 upon the Appellant's stock of goods consisting of dry goods, crockery, hardware and groceries, situated in a certain store at Richmond, for the period of five years; that on the 15th day of May 1855 the stock of goods insured was removed with the consent of the Respondents to a new wooden building near the Railway Depot in Richmond where, by an agreement with the Respondents endorsed upon the policy the goods were to remain insured the same as before removal; that appellant was the proprietor of the last mentioned building and of the insured goods and consequently had an insurable interest in the said goods; that the goods were consumed by fire on the 27th day of August 1855; that Appellant gave Respondents due notice of the fire and of the amount of his claim for indemnity and named an *expert* on his behalf, and complied with all the formalities required by law, but the Respondents failed to name an *expert* on their behalf and refused to settle the claim of the Appellant. The conclusions are for the sum insured, £375, interest and costs.

The Respondents met the action by two special exceptions and a *defense au fonds en fait*. By their first plea they allege, in unambiguous language, that the Appellant after removing his goods burned the building in which they had been contained with intent to defraud the Respondents and other Insurence Companies. The second plea alleges that the goods were insured only in the building mentioned in the policy, where however they were not burned, and that Respondents did not consent to the alteration of the policy nor to continue the insurance after removal; that while the policy granted by Respondents was in force the Appellent effected an insurance upon the same goods with the Ætna Insurance Company, of £800, without the knowledge or consent of Respondents and that their policy became in consequence null; that the sum insured in both policies exceeded the value of the goods, and that the double insurance was fraudulent; that no notice was given by Appellant within 20 days of the amount claimed and of the name of an *expert* on behalf of Appellent; that Appellant had not accounted for exact quantity of goods, and had not attempted to show the amount of his loss; that the fire was caused by the carelessness and negligence of the Appellant; that the Appellent fraudulently represented the amount of his stock at the time of the fire to be greater than it really was, and removed the most valuable part of the goods previous to the fire and has since disposed of them.

Issue being joined, the parties went to evidence, the Respondents at great length. On the 27th day of March last the following judgment was rendered, viz:

"The Court, &c., considering among other things that at the time the goods insured by the Defendants in "this cause, for the loss of which the Plaintiff claims to be indemnified by the said Defendents, were destroy-"ed, the said goods were also insured by the Ætna Insurance Company, such last mentioned insurance having "been effected by the Plaintiff without the consent in writing of the said Defendants, as by law required, and "without their knowledge, as is proved by the evidence adduced in this cause by the said Defendants, and "that by reason of such double insurance, the policy granted by the said Defendants to the said Pleintiff, on "which his action in this behalf is founded became null and void, doth maintain the exception of the said De-"fendants lastly pleaded in this cause, doth declare the said policy so granted by the said Defendants to the "said Plaintiff, null and void and doth dismiss the action of the said Plaintiff in this behalf, with costs, &c."

The principal questions of law raised by the Respondents in their pleas are the following, viz:—

1. That the Respondents did not consent to the alteration of the policy, and that consequently the insurance was not continued after the removal of the goods.
2. That the policy was rendered void by the insurance effected with the Ætna Insurance Company.
3. That the Appellant failed to give a sufficient notice of his loss within the time prescribed by law.

1. *The alteration of the Policy.* The usual mode of altering a policy of insurance is by indorsement in writing made thereon; (1) and this method was employed in the present case. The Appellant claims that the insurance upon his stock of goods was continued by the Respondents, after removal in virtue of a special indorsement upon the Policy, signed by their Secretary and tacitly admitted by the Respondents not only by their general practice in regard to such continuances of insurance but by their afterwards rejecting the Appellant's claim solely upon another ground. The indorsement referred to is in the following terms:—

1. 1 Phillips on Insurance No. 109.

"The goods insured within have been removed to a new building about twenty rods South of the block of "cottages on the Depot ground at Richmond Station, where they are to continue insured the same as before "removal. Sherbrooke, July 21st 1855. (Signed) HOLLIS SMITH, Sec'y." If it be the practice of an Insurance Company to sanction alterations made by their Secretary, this makes his Act valid. (1) That such has been the practice of the Respondents is abundantly proved by the evidence of their Secretary and of Leet, one of their agents, as well as by the answers given on behalf of the Respondents to the Interrogatories *sur faits et articles*, submitted to them. The removal of the goods and the alteration of the Policy were known to Respondents but never complained of by them. At the annual meeting of the Directors which took place a little more than a month after the fire, and at which, it is to be presumed, the whole matter of the Appellant's claim was gone into, the action of the Secretary, in regard to the alteration of the policy, was not called in question, but was impliedly ratified by the formal rejection of the claim upon the sole ground of a double insurance not consented to by the Respondents. The Appellant need not comment upon the bad faith exhibited by this pretension of the Respondents in regard to the alteration of the policy, but it would be manifestly unjust for them to be permitted to ignore their constant practice and repudiate the action of their principal executive officer for the purpose of defeating the claim of one of their members.

2. *The double insurance.* It was upon this ground alone that the action was dismissed. The Appellant respectfully maintains that the Court below was in error in holding that the subsequent insurance of his goods with the Ætna Insurance Company rendered his policy with the Respondents absolutely null. There is no law of Lower Canada which requires notice of a subsequent insurance to be given to previous insurers, and their consent to the same to be given on pain of nullity of the policy first granted. Such a condition is frequently inserted in policies of insurance, but there was no such condition in the present case. The statute authorising the establishment of Mutual Fire Insurance Companies in Lower Canada, and under which the Respondents are incorporated, (2) provides "that if any insurance on any *house* or *building* shall "be made with the Company, and with any other insurance company, or office, or person at the same time, "the policy issued by the company shall be void, unless such double insurance shall have been agreed to by "the directors, and their consent to the same signified by an indorsement on the policy, signed by the presi- "dent and secretary." (3) This provision evidently does not refer to insurances upon goods or other moveable property. If, however, any doubt could exist upon this point, it has been set at rest by the Legislature, in passing the Act 19 Vic., Cap. 58. The preamble of this Act declares that it "*is expedient to amend*" the Act 4 Will., 4, Cap. 33, "*so far as relates to double insurance, &c.,*" and the 1st section provides that, "the "provisions and enactments contained in the twenty-third section of the above cited Act shall be held to in- "clude and have reference to all property, as well personal as real, &c." It is true that this amending Act does not apply to pending suits (4) and does not therefore govern this case; but it may be fairly cited as affording a rule of interpretation, should any be required, of the twenty-third section of the Act which it is intended to amend. Double insurances are recognized both by the English and French law, and are prohibited by neither. Although it is the practice of some insurers to require notice of a double insurance, if the policy contains no stipulation on the subject, the assured may insure with different companies, and recover indemnity from any of them. (5) The Appellant maintains that there can be no question of this when the value of the goods does not exceed the amount insured by all the policies. (6) This, he apprehends, is established by his evidence of record. The insurance with the Ætna Insurance Company was effected subsequently to that with the Respondents, so that there can be no pretension that the want of notice operated as a misrepresentation or concealment. At the time the Appellant received his policy from the Respondents, he told Mr. Smith, the Secretary, that if he could not get more insurance from the Company, he would be obliged to get additional insurance in another company. (7) That gentleman did not then inform the Appellant that in case he should carry out his intention, he would be required to give notice to the Respondents, or make any objection to his effecting an insurance with another company. The Appellant conceives that he had a right to effect the second insurance, and that the Respondents were in no way prejudiced by his doing so.

3. *The want of notice of amount claimed, &c., within twenty days.* Immediately after the fire, the Appellant notified the Respondents, by letter, of the fact, and inquired what verification of his loss was required. The Secretary answered that he must shew as clearly as possible the amount of his loss, but failed to remind him of the time within which his claim ought to be preferred, and of the necessity of his naming an *Expert*. A little more than a month elapsed between the fire and the formal notice of the Appellant, claiming £375, and naming his *Expert*. Before receiving this last notice, at their annual meeting held on the 1st day of October, 1855, the Directors of the Company passed a resolution rejecting the claim of the Appellant solely upon the ground of the double insurance. No other resolution was passed upon the subject. The notice of the Appellant was answered by the Respondents the following day in a letter from the Secretary, rejecting his claim for the reason before stated. The Appellant contends that the delay of twenty days imposed by the statute (8) is not a fatal delay. It is not said that the claim must be preferred within the delay *à peine de nullité*. Such provisions are always liberally construed. (9) Where the notice is to be given *forthwith*, and the giving of it is held to be a condition precedent, it is sufficient if the condition be performed in a reasonable time. (10) But our own law rather regards the interest of the party raising the objection than any nice technicalities of language. Even the default to give the notice is not a *fin de non recevoir* to an action on the policy; (11) and subjects the assured to no penalty, unless the assurer can shew that he has been injured by the want of notice. (12) Such injury has not been pretended by the Respondents in this case, nor could it have been, for they rejected the Appellant's claim before receiving his formal notice. But, even if the Respondents had a right to require the compliance with the very letter of the Act, in regard to the amount claimed and the naming of an *expert*, they have waived such right by their silence and by objecting to the loss on another ground. (13)

The Appellant conceives that upon all these legal questions raised by the Respondents, the weight of authority as well as of reason is against them.

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1. 1. Phillips Ins. No. 110.
   2. Greenl. Ev. (Edition of 1850,) No. 405, *note*.
2. 4 Will. IV. Cap. 33, p. 594 Rev. Stat.
3. " " Sec. 23.
4. Sec. 7.
5. 2 Phillips Ins. No. 1250.
6. Pothier *Cont. d'Ass.* Nos. 159, 100.
   3 Pardessus, *Dr. Comt.* No. 767. Merlin, *Verb. Police and Contrat d'Ass.* No. 13.
7. Deposition of Steel, witness of Appellant.
8. 4 Will. 4. Cap. 33, Sec. 10.
9. 23 Wend. Rep. 525-527. 11 John. Rep. 240-260.
10. 3 Greenl Ev. No. 406.
11. Merlin—*Verb. Police et Cont. d'Ass.* No. 26.
12. Pothier *Cont. d'Ass.* No. 127.
13. 2 Phill. Ins. Nos. 1802, 1812 and 1813.
    1 " No. 889.

It remains to speak of the evidence. The Appellant established his claim to indemnity by three different methods. 1. By general evidence; 2. by specific proof of loss, and, 3. by calculations based upon his books of accounts (so far as saved) those of the invoices of his purchases which could be collected and an estimate of the relative proportion between his cash and credit sales. The result of each of these different modes established that the amount of goods consumed by the fire was between £1300 and £1500.

The particulars of the fire are proved by the witnesses Burney and Hay; and the fact that the Appellant's stock of goods was removed to the new building and there burned is proved by the two witnesses named and by the witnesses Dyson, Leet and Steel. The Respondents have boldly asserted in their first plea that the Appellant set the fire himself after he had fraudulently removed his goods; but they have not attempted to prove either of these allegations, nor have they been able to shew the slightest reason for the dark suspicions which gave rise to charges of so grave a character. On the contrary it is established in evidence that when the fire broke out the Appellant was asleep in his bed and that he and the other inmates of the house had some difficulty in securing their personal safety. The Appellant cannot think that the mere allegation of crimes such as are charged upon him by the Respondents, but unsupported by a syllable of evidence, can operate to his disadvantage, however it may affect those who were ready to make use of such unwarranted means to injure the Appellant.

The general evidence of the amount of Appellant's loss is sufficiently clear and comes from the mouths of several witnesses. Burney, who was a clerk of Appellant at the time of the fire, states that in his opinion the stock of goods was worth about £1500; that it was a large stock for a country store, and that three days were occupied in removing to the new store. Dyson also proves the time it took to move the stock and that the new store was pretty well filled with goods. Leet, an agent of the Respondents, but who appears to have no bias towards either party, says that the Appellant had a pretty good stock of goods in his old store. Steel, a former clerk of Plaintiff, proves that Appellant had a good stock of goods. That this general evidence of the amount of a stock of goods is of value is established not only by the testimony of the Appellant, but in a pointed manner by that of the Respondents. The witnesses Hopkinson, H. Smith, Bostwick and Camphell, examined on behalf of the Respondents, agree in saying that a country trader and his clerk could form a general idea of the value of a stock of goods. It is to be remarked, that although the Respondents have spared no pains to detect flaws in the statements of the Appellant, they have not attempted to shew by general evidence that the Appellant's stock of goods was smaller than is represented by his witnesses.

Shortly after the fire, upon the advice of Mr. Kingan, the Appellant and his clerk Burney proceeded to make out from memory a list of the goods comprising Appellant's stock immediately before the fire. This list is referred to throughout the evidence as "Book A." Burney states that this inventory was made by himself and the Appellant from memory. He does not pretend that the quantities of goods set down are precisely correct, but avers that no kind of goods were entered but what he remembered to be in the store, that the book was made fairly and that a large quantity of winter goods, which were put away were omitted in the statement. As this exhibit is made the principal, indeed almost the only point of attack by the Respondents, the Appellant will refer to it, and to the inferences sought to be drawn from it, more particularly, when he comes to comment upon the line of defence adopted by the Respondents.

The Appellant would now call the attention of the Court to the proof of the amount of loss which is drawn from those of his books of account which were saved, from his invoices so far as collected and a comparison of his cash and credit sales. It will be borne in mind that his cash book and a part of his invoices of purchases were burned. Of course the positive proof that would have been afforded of the amount of his cash sales, by his cash book had it been saved, had to be supplied by general evidence. That the credit sales of Appellant exceeded his cash sales is proved by Burney, Miller and Steel. The task of making a statement of the affairs of the Appellant from the materials to be procured, was undertaken by Mr. John Kingan, a witness examined on behalf of the Appellant, and whose business capacity is abundantly testified by the statement furnished by him and clearly explained in his deposition. After ascertaining the amount of purchases from what invoices &c. could be obtained, Mr. Kingan made a statement of the credit sales, carefully examining every account in the books for that purpose; then statements of how much appellant had received in cash and produce, and of moneys paid out. Assuming the cash and credit sales to be equal, although the witness was satisfied the credit sales were greater, Mr. Kingan established the loss to be more than £1300. The summary of his statements and calculations is as follows, viz:—

Net Stock as shewn by Stock Book E and Invoices		£3906 2 6
Deduct—Net Credit Sales	£1269 13 7	
Net Cash Sales	1269 13 7	
		2539 7 2
BALANCE		£1366 15 4

The evidence of Mr. Hutchins and Mr. Cross, two competent business men, also establishes that the loss of the Appellant must have exceeded £1000; and they agree in stating that the result would not have been materially altered had they taken into account the goods saved. The Appellant submits that the evidence of Mr. Kingan, Mr. Cross and Mr. Hutchins, based as it is upon arithmetical calculation and unshaken by the Respondents, is of itself sufficient to establish his claim.

The whole energies of the Respondents in adducing evidence in the Court below, were directed to proving that the statement "A" furnished by the Appellant, was erroneous, and that it would be impossible to make such a statement with any degree of accuracy. It cannot be denied that several errors, of greater or less magnitude, were discovered by the Respondents in the inventory referred to as "Book A." The Appellant has no desire to dispute this fact, but he does most emphatically deny that the inference of fraud drawn from it, is just. The Respondents say that the book is erroneous, and their witnesses are unanimous in asserting that such a list could not be made without many errors, even if made with fairness, as it is proved the one in question was. The inference is reasonable then, that the errors in question were fallen into honestly, and were not the result of a fraudulent intent. *La fraude ne se présume pas.* Besides no inducement is shewn on the part of the Appellant to commit a fraud. The alleged overcharges amount to £103.13.2d, and with every possible allowance being made, the Respondents cannot maintain the loss of the Appellant to have been less than £1000. The amount insured by the policies, was £975. Independent of the disputed inventory, there is evidence of record to show that from the time of the last account of stock up to the time of the fire, the Appellant's stock of goods amounted to £3906.2.6d, and by his sales to £2539.7.2d. The balance, to represent stock at the time of the fire, was £1366.15.4d. What became of these goods? The Appellant's evidence establishes that they were burned, with the exception of a small amount saved, and the Respondents have entirely failed to make good their charge that the goods were fraudulently disposed of by the Appellant. To offset against the errors claimed by the Respondents, are the winter goods referred by Burney as inadvertently omitted from the statement, and other articles, which, as the witnesses generally agree in saying, would of necessity be omitted in a statement made out from memory.

But if the Appellant committed mistakes in making out his schedule of goods, a ready palliation will be found for them in the many blunders in the calculations and statements contained in the Respondents' "Exhibit XX." To the cross-examination of the Secretary of the Company, upon these calculations and statements,

the Appellant would particularly direct the attention of the Court. After having access to the books of account of the Appellant, and the statement in their possession for two years they produced the Exhibit XX. The object of the Respondents in making out this exhibit, as repeatedly stated by the Secretary, was to arrive at a correct account of the Appellant's stock. But in order to do so, in regard to a great many articles, such as Teas, Tobacco, Broad Cloth, Flannels, Coats, Vests, Gloves, &c., the amount of stock taken in 1854, amounting to nearly £1000, was left out of the account altogether, and erroneous balances put down against the Appellant as overcharges! In some instances the inference is drawn that certain goods are to be deducted, and must have been disposed of since the fire, simply because they do not appear in the inventory A. These mistakes committed by the Respondents are some of them admitted by the Secretary at the close of his deposition, and are not here referred to with a desire to establish a charge of bad faith against the Respondents, but simply to show that grave errors may consist with upright intentions, and that the mistakes of the Appellant are entitled to be viewed charitably.

The Appellant submits that he has acted in good faith. He never concealed the fact of the double insurance upon his goods, but gave notice to the Secretary of the Respondents of his intention to effect it. He has afforded the Respondents every opportunity to investigate his claim, by giving up all his books of account. In establishing his loss he followed the mode which the witnesses of the Respondents say must necessarily have been adopted under the circumstances in which he was placed, and he humbly conceives that the amount of his loss was satisfactorily proved to be much greater than the sum insured upon his goods.

The judgment of the Court below rests upon a legal objection which the Appellant conceives to be unfounded. An examination of the record, as he apprehends, will satisfy the Court here that instead of his action being dismissed, judgment ought to have been awarded him for the full amount of his claim.

THOMAS W. RITCHIE,
For Appellant.

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For Appellant.