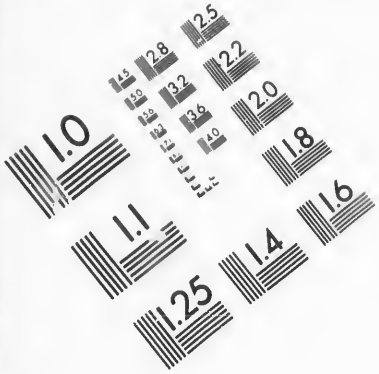


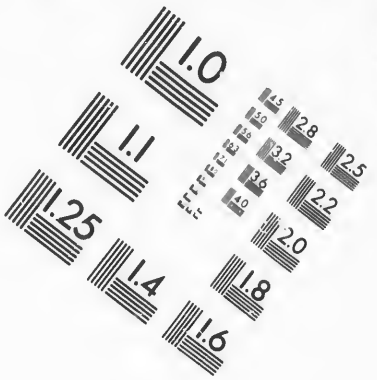


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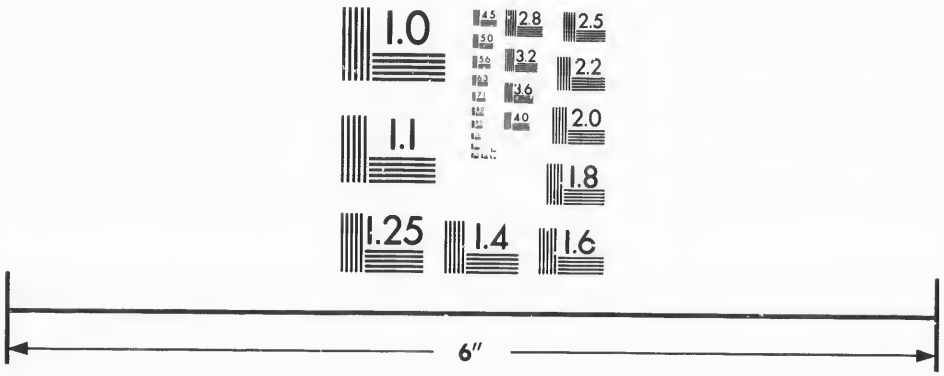


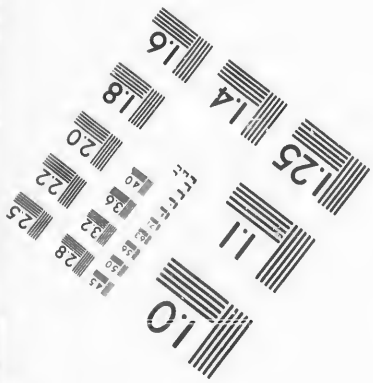


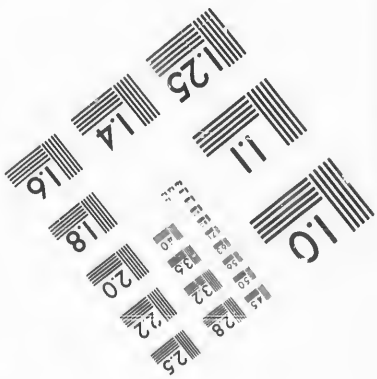


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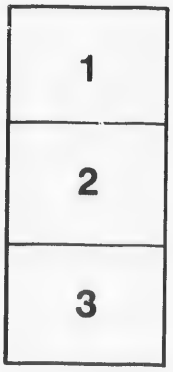


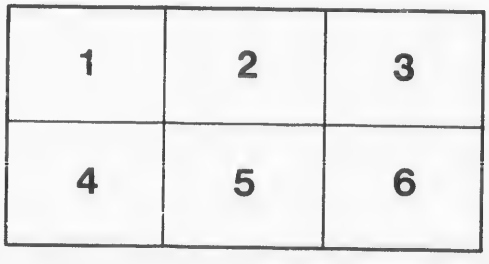

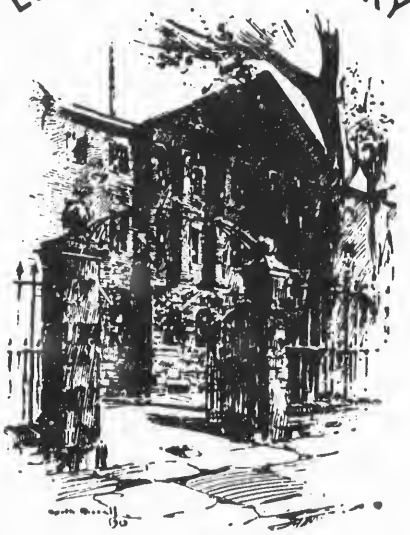

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Insurance Case

In the Supreme Court of Nova Scotia.

## JOHN CAMPBELL and MALCOLM CAMPBELL,

vs.

## THE ÆTNA INSURANCE COMPANY.

THE Subscriber has published the following decision of the Supreme Court of Nova Scotia, in the case of CAMPBELL & Co., *vs.* THE ÆTNA INSURANCE COMPANY, of Hartford, Connecticut, on account of its settling a question of great importance to Fire Insurance Companies, and on which there had been many conflicting opinions.

ARCHIBALD SCOTT,
*Agent for the Ætna Insurance Company.*

HALIFAX, NOVA SCOTIA,
31st May, 1860.

THIS was an action on a policy of insurance entered into by Cunard and Company on behalf of the plaintiffs in the Ætna Fire Insurance Company of Hartford, Connecticut, on buildings and goods therein, situate at Baddeck, in the County of Victoria and Island of Cape Breton. The amount sought to be recovered from the defendants by the plaintiffs, as mentioned in their declaration, was £1000. The pleas of the defendants opened the grounds of their defence, and were in substance as follows:

1. That the stock of merchandize mentioned by the plaintiffs as covered by the policy of insurance, and supposed to have been consumed by fire, were not in the building at the time it was destroyed.

2. That the plaintiffs after effecting the said policy of insurance, and while it was in force, made another insurance on the same property in the office of the Liverpool and London Fire and Life Insurance Company, but gave no notice of it to the defendants, nor had it endorsed upon their policy, or otherwise acknowledged by the defendants in writing, in accordance with the provisions of the said policy; and in consequence the policy became void.

3. That no suit was brought by the plaintiffs for the recovery of the amount claimed under the said policy within twelve months after the loss took place, as required by the seventeenth condition endorsed on the policy.

To those pleas a replication was p[illegible] the plaintiffs, which in substance was as follows:

1. That the policy declared on was kept in force until after the loss by fire by the payment of the premiums by the agents of the plaintiffs, who were interested therein as creditors of the plaintiffs, and that the policy taken out in the Liverpool and London Fire Insurance Company was obtained from the agent of that company in ignorance of that fact, or that there existed any insurance by the defendants of the said property, and in good faith. That no notice was or could be given to the said company of the insurance effected and existing by the defendants, as by the policy of that company so obtained was required to make it effectual, and no claim was made on that company after knowledge of insurance effected with the defendants, nor was any insurance ever matured or effectually made with the said company.

2. That the policy mentioned by the defendants in this plea was ordered by one of the plaintiffs in ignorance of the existence of the insurance by the defendants, in good faith, and that such policy was never perfected or made available, nor any claim set up thereon after knowledge of the insurance by the defendants. And, further, that no insurance on the same property was made by the plaintiffs in the company mentioned in the defendants' plea contrary to the provisions of the policy declared on in the writ.

3. That the plaintiffs, after the loss, made a claim upon the defendants without any delay for the amount sought to be recovered in the action. That a negotiation for the adjustment of the claim was thereupon commenced between the defendants by their agents and solicitor and the solicitor of the plaintiffs and their agents, and was still open and undetermined when the period of twelve months after the loss expired, and that the plaintiffs' claim on the defendants was never abandoned or withdrawn or intended to be so, and after the loss twelve months elapsed before the suit was commenced in consequence of the said negotiation, and not of any intention to abandon or withdraw the claim on the part of the plaintiffs or their agents.

The cause was tried at the sittings of the Supreme Court, at Halifax, before His Honor Mr. Justice Wilkins and a petit jury, on the 16th November, 1859. The counsel on the part of the plaintiffs were the Hon. J. W. Johnston, Attorney General, and J. W. Ritchie, Esq., and on the part of the defendants the Hon. Wm. Young, William Sutherland, and S. L. Shannon, Esquires.

The facts of the case are so fully stated in the decision of Mr. Justice Bliss that it is unnecessary to enter into any detail in this pl[illegible]ce. At the close of the evidence on the part of the plaintiffs, the defendants counsel, Hon. Wm. Young, moved for a nonsuit on the ground of a double insurance, and that the action was not brought in time, as set out in the defendants' pleas. The

learned Judge declined to nonsuit, and in his charge to the jury put the case most favorably to the plaintiffs, relying upon the case of Jackson, et al, *v.* The Massachusetts Fire Insurance Company, (23 Pickering, 418,) as in point and as guiding him in his view. The jury returned a verdict in favor of plaintiffs for the sum of £877.

A rule *nisi* to set aside the verdict was obtained on the last day of the sittings, which was argued at the ensuing term of the Court before Judges Bliss, Dodd, Desbarres, and Wilkins, by the Hon. J. W. Johnston and J. W. Ritchie, Esq., on the part of the plaintiffs, and the Hon. Wm. Young and Wm. Sutherland, Esq., on the part of the defendants.

On the 20th day of April, 1860, the Court gave their decision in favor of the defendants by making the rule *nisi* for a new trial absolute.

The points of the case were elaborately discussed by Mr. Justice Bliss and Mr. Justice Wilkins whose decisions are as follows:

Bliss, J. This was an action on a policy of insurance against fire made with the defendants by S. Cunard & Co. on buildings and goods, the property of the plaintiffs in whom the declaration averred the interest to be.

The policy contained among other things this proviso: "that if the assured or their assigns should hereafter make any other insurance on the same property, and should not, with all reasonable diligence, give notice thereof to this company, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect." The defendants pleaded that after making the policy the plaintiffs made another insurance on the same property in the Liverpool and London Insurance Company, and did not give notice thereof to defendants nor have the same endorsed on the defendants' policy, or acknowledged by the defendants in writing. The defendants at the trial moved for a nonsuit upon this point being established in proof, but the learned Judge declined to nonsuit, and in his direction to the jury told them that there had not been any such double insurance as made the first policy void.

The same objection was raised in the argument of this case before the Court. The facts of the case are briefly as follows: Cunard & Co., to whom the plaintiffs were indebted insured the property in question in 1854 in the defendants' office, and continued the same insurance, though not for the same amount, down to the year 1857, charging always the premium of insurance to the plaintiffs. On the 2nd December, 1857, they renewed the policy for £1000 from that date to the 2nd June, 1858, and charged the premium as heretofore to the plaintiffs. The plaintiffs not having received from Cunard and Co. any account of such charge, and being, as they say, wholly ignorant of such insurance, applied to the agent of the Liverpool and London Insurance

Company here, and on the 18th January, 1858, effected with the latter an insurance on the same property for £1000 for one year, and paid the premium on the same. The latter policy also contained a condition with respect to double insurance to this effect: "That persons who have insured property with the company shall give notice of any other insurance already made or which shall afterwards be made elsewhere on the same property, so that a memorandum of such other insurance made may be endorsed on the policy effected with this company,—otherwise such policy will be void; provided, however, that on such notice being given at any time after the issue of the policy, it shall be optional with the company to cancel such policy, returning the premium for the unexpired term thereof, if they shall so deem fit.

No notice of the policy with the Ætna Company was given to the Liverpool and London Company till after the loss. This took place on the 15th May, 1858, when the property in question was destroyed by fire. On the next day notice was given by the plaintiffs to the agent of the Liverpool and London Company of the loss, and at the same time to the agents Cunard and Co. who were then informed of the insurance effected with this last company. And the proofs of the loss were, through the same agents, sent to the Liverpool and London Company. The fact of the second insurance was then, for the first time, made known to the Ætna office. The plaintiffs, too, then first learned of the insurance made by Cunard & Co., for them in the Ætna office, and thereupon abandoned the claim which they had made for the loss on the Liverpool and London Company, and the Ætna resisting the claim upon them the present action was subsequently brought.

The question then which is raised for our decision in the case is, whether the insurance effected by the plaintiff with the London and Liverpool Company by the policy of the 18th January, 1858, of which no notice was given to the defendants until after the loss on the following May, was a breach of the condition which required that notice; or whether, inasmuch as no notice of the first policy was given to the latter company, as their policy also required, the plaintiffs can be said to have made another insurance which rendered it necessary under the condition on the defendants' policy to give notice of it to the defendants.

Though it is said that such conditions are generally introduced in English policies, no cases from the English Court have been cited, nor am I aware that any such exist, on which the present question has arisen. The condition seems to have first sprung up on policies of insurance against fire in the United States; and the effect of it, under similar circumstances to those in the present case, has been in several instances the subject of decisions in the Courts of that country. They are particularly conversant with it, and we may at all times gladly avail ourselves of their experience and judgment

to assist our own, knowing the very high character for professional learning and eminent abilities which the Judges of those Courts deservedly bear. In no case could we with more propriety resort to them than the present, for the policy on which this question arises is made with a company incorporated and having its local existence in that country.

The question identical in all respects with that now under our consideration, and arising out of circumstances precisely the same, appears first to have come before the Supreme Court of Massachusetts in Jackson *v.* the Massachusetts Mutual Fire Insurance Company, in 23 Pick. 418, and was there disposed of very briefly in the judgment of Dewy, C. J. He says that an insurance which shall operate to avoid the policy of the defendants as a violation of its rule, must be a valid and legal policy, and effectual and binding upon the assurers: here it was wholly nugatory, and of no effect, because notice of the first was not given to the last office.

Stacey *v.* Franklin Fire Insurance Company, 2 Watts. & Sergt. 507, appears to be a similar decision to that first cited, but I have not been fortunate enough to see the case itself. The same question—the same at least as I take it in principle—came before the Supreme Court of the United States in Carpenter *v.* the Providence Washington Insurance Company, 16 Peters, 495, and reported also in 14 Curtis, 386.

The policy on which the action was brought contained the very same condition respecting notice to be given of any prior or subsequent insurance as that in the Ætna Company's policy. Before the policy in that case had been effected, there had been a prior one made with the American Insurance Company, which was again renewed after that effected with the Providence Washington Company; but neither the prior policy, nor its renewal, were communicated to the latter office until after the loss. An action had been brought on the renewed policy against the American Insurance Company, which was successfully resisted on the ground that there was a material misrepresentation of the cost and value of the property insured. Upon the trial of the action against the Providence Washington Company, the want of notice of the other policy was set up as a defence. It was, however, contended on the part of the plaintiff that though that policy was good on the face of it, yet if it was procured by such a material misrepresentation as that above mentioned, it was to be deemed utterly null and void, and therefore that no notice of it need be given. The Court at the trial refused to instruct the jury so, but on the contrary instructed them that if the policy was at the time it was made treated by all the parties thereto as a subsisting and valid policy, and had never in fact been avoided, but was still held by the assured as valid, then notice of it ought to have been given to the defendants, and if not, the policy declared on was void. The instructions were reviewed and confirmed in the judgment of

the Supreme Court of the United States, which was delivered by Story, J. He says: "We are of opinion the instructions were properly given. The policy procured by misrepresentation was not utterly void *ab initio*, but merely voidable, and till avoided by the underwriters upon due proof of the facts, it must be treated for all practical purposes as a subsisting policy." The question, he continues, "is not how the policy may now be treated by the parties, but how it has been treated by them at the time when the policy declared on was made." And it is, he says, "in our judgment free from all reasonable doubt that notice of a voidable policy must be given to the underwriters, within the words and meaning of the stipulation in the policy." Indeed we are not prepared to say that the Court might not have gone further, and have held that a policy existing and in the hands of the insured, and not utterly void upon its very face, without any reference whatever to any extrinsic facts, should have been notified to the underwriters, even though by proofs, afforded by such extrinsic facts, it might be held in its very origin and inception a nullity. He then explains what he supposes to be the object of the stipulation that notices of other insurances should be given, namely: that the underwriters might be able to judge whether they ought to insure at all, and at what premium, and whether there still remained such substantial interest of the insured in the premises as will guarantee on his part vigilance, care, and strennous exertion to preserve the property, and that they may also know the rateable proportion which they would have to bear in case of loss. And he thinks if these clauses are construed with a close and scrutinising jealousy, it will have the effect of discouraging the establishment of such offices, or of restraining their operations to cases where the parties and premises are personally known to the underwriters. However, he says, "be these considerations as they may, we see no reason why, as these clauses are a known part of the stipulations of the policy, they ought not to receive a fair and reasonable interpretation according to their terms and obvious import." And he adds—"we are of opinion that there is no error in the instructions. On the contrary, there is strong ground to contend, that the stipulations as to notice of any prior or subsequent policies were designed to apply to all cases of policies then existing in point of fact, without any enquiry into their original validity and effect, or whether they might be void or voidable." Now, I confess my inability to discern any essential distinction between this case and that upon which we are called on to decide.

The whole of these remarks of Mr. Justice Story apply equally to the one as to the other. Misrepresentation, which is fraud, vitiates the policy as surely and as effectually as the want of giving notice of another insurance can do; and if the policy in the first case must still be communicated under the stipulated condition, so must equally the policy on the other. The language of

Mr. Justice Story seems purposely to go beyond the particular case then before him, and to extend to and include all cases where the policy was not void upon its face, but was liable to be made so by extrinsic circumstances. And indeed the decision, if there was no such general language to make it applicable to all cases that came within that principle, would necessarily extend to them, for that is the very ground on which the decision rests. It is very clear then to me that this case distinctly overrules Jackson *v.* the Massachusetts Mutual Fire Insurance Company, 23 Pick. 418, and being the judgment of the highest Court in the United States, we must take it to have settled the question. It is true that Mr. Justice Story does not expressly, in so many words, overrule the case in 23 Pick., which I take him to refer to; and he does certainly intimate that the circumstances in that were distinguishable from those of the case which he was then deciding. But one cannot read his remarks without perceiving that his decision does overrule the other, and that he was conscious that it did so, for in conclusion he says, "if the result to which we have arrived differs from that of those learned State Courts, we may regret it, but it cannot be permitted to alter our judgment."

There is another case from the Supreme Court of New York, to which we were referred at the argument—that of Bigler *v.* the New York Central Insurance Company, 20 Barbour, 635.

There the same state of circumstances existed as in the case before this Court, and the same question arose upon them as here. Subsequent to the policy with the defendants, the plaintiff effected a policy with the Globe Company, but gave no notice to them of the policy with the defendants; nor did he give notice to the defendants of the Globe policy. Mason, J., by whom the opinion of the Court was delivered, says: "The clauses in the policy of the Globe Company (requiring notice) relieved that company from liability on their contract of insurance (as notice of the prior policy had not been given to them), no action could be maintained on it, if they saw fit to set up the defence." The Globe policy was not void upon its face, but as soon as the fact was alleged and proven it relieved that company from any liability upon their contract. The real question therefore presented for our adjudication, is whether this policy in the Globe Company can be set up by the defendants to avoid their contract of insurance with the plaintiffs; in other words, whether an insurance that shall operate to avoid the defendant's policy under the clause (requiring notice of any subsequent insurance), must not be a valid policy—one that is binding on the insurers. He then refers to the case of Carpenter *v.* the Providence Washington Insurance Company, 16 Peters, which I have so fully stated, and says it determines the question in favor of the defendants. That case holds, that under such a condition notice of subsequent void or voidable policies must be given to the underwriters, unless the policy is void

upon its face, without any reference whatever to extrinsic facts. Mr. Justice Mason therefore treats that case as establishing a principle which decides any case that comes within it, as I have already said it must do, and not as being confined to the circumstances of the case itself. It settles, he thinks, the very identical point before us, as it appears also to me to do. Mr. Justice Mason then goes on to state that the Globe policy was not either void or voidable on its face, it was merely voidable by the underwriters upon due proof of the facts. The plaintiff, he says, held on to that policy until after the destruction of the property insured, and brought an action upon the policy against the Globe Company, thereby affirming the validity of the policy which that company settled by giving their notes.

The plaintiff having effected this policy in the Globe Company, and held it as valid, deriving all the benefit of an insurance contract from it, were bound to give notice to the defendant under the clause of their policy, although the policy was voidable if the Globe Company saw fit to set up the defence. The case falls within the very words and meaning of the stipulation in the defendants' policy. He adds: "I am aware that the case of Jackson *v.* the Massachusetts Mutual Fire Insurance Company, 23 Pick. 418, and Stacey *v.* the Franklin Fire Insurance Company, 2 Watts. and Serg. 544, held a different doctrine, but these cases, so far as they conflict with the views above expressed, are not to be followed." Now this case is in every respect on all fours with that before us, even to the circumstance of the plaintiff having treated the subsequent policy as valid by calling upon the company for payment under it, after the loss had taken place, though I do not myself consider that a circumstance of very great moment, further than as conclusively showing that the subsequent policy was meant and was treated as a valid subsisting policy. The question, therefore, which has arisen in the present case I must consider under these late decisions, and especially under the more authoritative one in the Supreme Court of the United States, to have been fully settled in that country

But without referring to any of these cases, and looking to this question as a new one in which these lights were wanting to guide us, I confess that I should arrive at the same conclusion. This clause in the policy, as well as the whole instrument, is to be construed according to the plain ordinary meaning of the language in which it is expressed. We are not to go out of its ordinary meaning to find another of a more enlarged or more restricted nature, unless we can clearly gather from the instrument itself that such was the intention of the parties thereto. It seems both the simplest and the safest course to give them the credit of meaning just what they say; no doubt there are exceptions, which require us to depart from a literal meaning, but this can only be done when we are satisfied that the words themselves do not express

their meaning. Now, taking the words of the condition in their plain, ordinary, obvious meaning, they appear very clear and unambiguous. The underwriters stipulate, that if the assured shall make any subsequent insurance, and do not give notice of it to them, the policy shall cease and be of no further effect. They guard themselves against the doing of a particular act—the making of another insurance—without that act being at once communicated to them; and it is the act itself, not the legal import of that act, which they then speak of. They have no means of knowing what the insured may do, and they therefore require that he shall communicate the fact if he make another insurance; and if he does make it, and does not communicate it, he commits a breach of that faith which they required of him. The making of another policy is not the less complete as a fact, because that policy may from some extrinsic cause have no legal effect. The underwriters do not stipulate against the insured making subsequently a *valid* insurance—that would subject them, it might be, to an intricate question of both law and fact. They say simply that he shall not make such insurance, resting the fulfilment or breach of the condition on the fact alone. And I cannot see the ground that would authorise us to introduce another word which would qualify their language, or give a different meaning to this condition. When the plaintiffs entered into the subsequent policy with the Liverpool and London Company they meant to effect a valid and binding one—they thought they had done so; it was on its face a good and valid one, and was held and acted upon by the plaintiffs as valid in all respects for, after the loss, they called upon that company to pay the amount insured by it. If the policy made with the Ætna Company had not then been made known to or discovered by the Liverpool and London Company, the latter would in all probability have paid the loss, as the Ætna might have paid it, if the other insurance had not then been made known to them. Surely, under these circumstances, this was an insurance made by the plaintiffs within the condition of their policy with the defendants, within, not merely the letter, but the very spirit and intention of it, and which ought to have been communicated to those underwriters. If the object and intention of the condition was, as the high authorities of the Court of the United States which I have referred to inform us, to check over-insurances, so that the assured should retain himself an interest in the property, which would excite him to care and vigilance in the preservation of it—and I will add, would remove the temptation to destroy which may arise where insurances have been effected beyond its value—then the application of the condition to such a case as the present is clear. For the effect would be the same, whether the assured had entered into a second which could not be avoided, or into one which he meant and believed to be valid. It is true that in this case the plaintiffs may not have known of the first policy, and might not therefore in-

tend to insure the property twice, but the condition herein cannot be contraverted by such an accidental circumstance as that; its meaning and intention must be just what it would be in the ordinary cases of insurance; and as in those it would be necessary to communicate a subsequent insurance like the present, so the plaintiffs, under the condition, were bound to do it. By the printed conditions annexed to the policy the Ætna Company reserved to itself the right to cancel the policy in case any subsequent policy should be made, which, with their own, would, in their opinion, amount to an over-insurance—in which case they were to pay back the premium for the unexpired time. When the plaintiffs effected the subsequent insurance this contingency happened, and whether the latter insurance were a valid policy or not the defendants ought to have been made acquainted with it. The very fact of such another insurance having been made, might, not improbably, induce them to exercise this right, even if they had known that the subsequent policy which was made was voidable, and therefore it was incumbent on the plaintiffs to communicate the fact. The condition then in its terms and meaning appears to me free from doubt; and as there has been a breach of this condition, the plaintiffs cannot recover under the policy. There was another objection taken by the defendants to which I may briefly advert, though after the opinion which I have expressed on the first point this is now of the less moment.

The policy of insurance stipulated by the seventeenth article of the conditions annexed thereto, that no action should be brought thereon unless within twelve months after the loss should occur. The defendants by their third plea set out this condition, and then formally pleaded that the action had not been brought within such twelve months.

To this the plaintiffs replied, that without any delay after the loss occurred they made their claim under the policy, and that a negotiation for the adjustment of it was therefore commenced between the defendants, by their agent, and the plaintiffs, which was still open and undetermined when the twelve months expired, and that the said lapse of twelve months arose from this negotiation, and not from any intention of the plaintiffs to abandon their claim.

If it were intended, as from the argument I take it to have been, that the question of a waiver by the defendants of this condition by such negotiation was raised by these pleadings, I must say that I cannot accede to that proposition. The facts that there was a negotiation, and that from that cause alone the delay of the plaintiffs in not bringing the action within twelve months arose, are put in issue by the replication, and the affirmative of these facts has been found by the jury, but that is not the point or the gist of the case: it is whether, on their part, the defendants thereby waived their right to insist

upon this condition; that is not to be inferred even by the Court upon the finding of the fact set out in the replication, but it was itself a fact—*the* fact—the important one which should have been submitted expressly to the jury, and by them expressly found, before the plaintiffs can avail themselves of it. The finding of the facts, as stated in the replication, by no means necessarily establishes the fact of waiver by the defendants. They may be perfectly true, and yet there may have been nothing like a waiver, and it seems impossible even to say that a waiver has been found by the jury; and to say the least of it, I doubt whether, under the evidence in this case, a jury could have come to such a conclusion if they would have been warranted in doing so. But at all events the waiver, as I have said, was the substantial fact, the facts as proved may or may not be evidence of it. The replication then seems to be, not an informal one, which would be cured by the verdict, for the verdict still leaves that matter doubtful. It must be considered rather as an immaterial issue, in which case a *venire de novo* would have to be awarded. But as I have said this is a matter of less consequence, as upon the first point I am of opinion that the plaintiffs cannot maintain an action upon their policy.

Judges Dodd and Desbarres gave their unqualified assent to the decision of Judge Bliss, as recited above.

Wilkins, J. The main question of law raised in this case was put to the Jury by the Judge who tried the cause favorably to the plaintiffs, expressly on the sanction alone of Jackson et al. *v.* The Massachusetts Mutual Fire Insurance Company, which was a decision of the Supreme Court of Massachusetts, reported in 23d Pickering. It of course could have no authority with us as a judicial precedent, and it has become necessary to test its principles, the counsel for defendants having impugned them, and having also directed our attention to other decisions in the United States Courts, which are said to be opposed to this. The policy of these defendants is made not merely voidable but absolutely void, in the proved event of another insurance, not notified to the company and endorsed on the instrument in question. To its particular terms it is not necessary for me to advert, as they have already been noticed. It is proper, however, to observe that the policy does not contain certain words which, if inserted, would have materially affected the point under consideration. The words are not, "in case the assured shall *knowingly* have already, or shall hereafter *knowingly* make any other insurance, &c."; nor is the language, "any other *effective* or *valid* insurance." On the contrary by the express words, and I think obvious intent, the mere fact of another insurance effected but not notified, and not mentioned in, or endorsed on the policy, renders the insurance, on proof of that extraneous

circumstance, *ipso facto*, void. There is no limitation in terms, or by necessary intendment, attached to the proviso, and I am not aware of any principle of law which would justify us in implying it. The general rule undoubtedly is, that conditions in written instruments are to be construed strictly. After such notice given as this condition requires, it would have been competent to the assurers giving notice to the assured to cancel the policy and refund the premiums. It was in order to enable them to exercise this discretion, in relation to what they might deem an over-insurance, that this general condition was introduced into all their policies. Here the facts show that during the continuance of their risk they had not this privilege. The terms of the condition in the report under consideration were, we must assume, purposely made general and unqualified. The assurers obviously intended to protect themselves by a condition of unlimited application, and did not design that it should be affected by the circumstances of any particular case. What reason have we to infer that they intended, when they framed the condition, that it should be rendered inoperative in the case of a person insured by them effecting insurance in another office,—void by the terms of its policy in consequence of another insurance,—that is, void contingently in case of the proved existence of an *extrinsic* fact, which might or might not become known to that office? Whether this latter policy would or would not become *void in effect*, would, manifestly, depend on the contingency whether the fact of an insurance elsewhere should or should not come to the knowledge of the assurers that executed it. If, to refer to the circumstances of the two insurances before us, the Liverpool and London Company had paid in ignorance of this extrinsic fact, or in waiver of it, there would have been in fact a double insurance, and it might be an over-insurance, as regards the defendants, and their protecting policy would have been thus contravened. It is observable, in this case there was a period during which both the assuring companies deemed their risks to exist, and yet neither had knowledge of insurance by the other.

We are not at liberty to adjudicate on this case merely in view of the particular facts that the plaintiffs when they effected the insurance at the English office were ignorant of the insurance effected by their agent with the defendants. We are required to construe and declare the legal effect of this proviso as our construction may affect any possible case that can arise under it.

We have to enquire what the true meaning of it is in point of law, looking at the words and regarding the situation and circumstances of the contracting parties, as well as the general policy of insurance companies, so far as it may reasonably be supposed to have suggested to this company the particular condition. We must have regard also to the particular policy of these defendants so far as it may be gathered from the language of the instrument before us.

Viewed in these lights, and the words used, which are unequivocal, being interpreted according to their familiar sense, we are constrained to say that the omission, on the part of the plaintiffs, to notify to defendants the insurance effected at the office of the Liverpool and London Company, was in contravention of the proviso under consideration, and that the defendants had, by that proviso, guarded themselves against liability in the case that has occurred.

The Massachusetts decision *alone* influenced my mind, at the trial, to instruct the jury as I did. It was not possible for me then to consider it with that careful attention which it has since been my duty to bestow upon it; but after having deliberately reviewed it, in connection with the other cases cited at the argument, I have come to the conclusion that it is unsupported by principle. This I am bound to say, although I have the highest respect for the learning which has ever distinguished the Court that pronounced it,—I think that it, in effect, limited and qualified the proviso in question in that case in a manner, and to an extent, that was never contemplated by the parties to the policy.

Entertaining these views of the question thus considered, it becomes unnecessary to decide the other points that were raised at the argument.

The rule must, in my opinion, be made absolute.