In the Queen's Bench.

APPEAL SIDE.

JOHN CHALMERS,
Appellant.

vs.

THE MUTUAL FIRE INSURANCE COMPANY FOR STANSTEAD AND SHERBROOKE COUNTIES.

RESPONDENTS' CASE.

PROVINCE OF CANADA, } **In the Queen's Bench.**
LOWER CANADA TO WIT. }

APPEAL SIDE.

JOHN CHALMERS,

Plaintiff in the Court below,
APPELLANT.

vs.

THE MUTUAL FIRE INSURANCE COMPANY FOR STANSTEAD AND SHERBROOKE COUNTIES,

Defendants in the Court below,
RESPONDENTS.

RESPONDENTS' CASE.

Appellant sued, in the Court below, for £375, amount of policy of insurance upon goods in store at Richmond. Policy dated 24th March, 1854. Respondents pleaded

1. That the goods were insured in a different Store from the one where they were burned, and policy rendered void.
2. That while Appellant had policy from Respondents, he insured £800 upon same goods in the Ætna Company, without giving Respondents notice, which vitiated his policy.
3. That Appellant did not comply with the requirements of 4 William IV. c. 33, in serving notice within twenty days, shewing amount of loss sustained and naming *expert*.
4. That the fire was occasioned by negligence and fraud on part of Appellant.
5. That Appellant made a fraudulent statement and representation of the goods saved at the fire, that a far greater quantity of goods were saved than were represented to have been, and the statement of the goods destroyed was wholly fabricated and untrue.

Respecting the first point it appears in evidence that subsequent to the making of the policy of insurance the Appellant removed his goods into another store from the one where they were insured, and thereby changed the nature of the risk. By 19th section of 4 William IV, c. 33, every policy must be signed by the President, and countersigned by the Secretary of the Company. Respondents contend that such a change in the policy of insurance requires all the formalities of the original policy. It is in fact a new policy. The policy being executed by an incorporated Company, it can only be made or changed in accordance with the directions of the charter. Phillips on Insurance, Vol. 1, p. 4. "Insurance is most frequently made by an incorporated Company, and such a Company is the mere creature of the act to which it owes its existence, and may be said to be precisely what the incorporating act has made it, to derive all its powers from that act and to be capable of exerting its faculties only in the manner which that act authorizes. To make a contract of insurance binding upon such Company, therefore, it must be executed in pursuance of its charter." Same authority Vol. 1, p. 12:

"An alteration in the contract is commonly made by an indorsement on the policy, signed by the insurers. A contract varying the policy or to cancel it, is as solemn an act as the insurance itself, and must therefore, be executed with as much formality, whether it be done by endorsement, or by a separate instrument. If a part of the underwriters on a policy consent to an alteration, the others are not bound by it. * * * "Where the policy was altered in a material part by the agreement of the parties, but could not be enforced as altered for want of a new stamp, it was held that the alteration had superseded the contract first made so that no action could be brought upon the contract as it stood originally."

The Appellant pretends that a consent to the change, by the Secretary of the Company, of goods to another building written upon his policy, is good, and binding upon the Company. This cannot be. The Secretary could not make a policy, and of course could not change one. The policy is made in duplicate and the consent was only entered upon the one in the possession of Appellant, as appears by Respondents' Exhibit "M." The only contract that is perfect is the original in duplicate, which has not been legally altered.

On second point, Vide 23rd section of 4 William IV. c. 33. Ellis on Insurance, p. 14:

"It is made a condition with most offices, that persons insuring property, should give notice of any other insurance, made elsewhere on the same property on their behalf, and cause a minute or memorandum of such other insurance to be endorsed on their policies, and in this case the Company is only to be liable to the payment of a rateable proportion of any loss or damage which may be sustained, and unless such notice be given, the insured are not entitled to any benefit under the policy."

Marshall on Insurance, Vol. 2, p. 789 * * * "Unless such notice be given of each insurance, to the office where another insurance is made on the same effects, the insurance made without such notice will be void."

Vide also Atwell vs. Western Insurance Company, Canada Jurist, p. 278, also Soupras vs. Mutual Fire Insurance Company of Chambly and Huntingdon, Ca. Jurist, p. 197.

Respecting the third ground of defence, Respondents refer to the 10th Section of 4 William IV. c. 33. The requirement to give notice of the occurrence of the fire and statement of loss, within the delay fixed by law, or the policy, as the case may be, is regarded, as a general rule, as imperative, and a failure to do it on the part of the insured, unless a further delay is stipulated or consented to, is fatal to his claim. This doctrine is recognized in an elaborate decision in the case of Dill vs. the Quebec Insurance Company, Revue de Jurisprudence, Vol. 1, p. 113. In this case the Plaintiff was only relieved from the voiding of his policy by establishing a positive agreement of extension of time.

The fourth ground of defence is not sustained by direct evidence, but is rendered worthy of consideration in connection with the fraudulent statement of loss.

The fifth ground of defence is well founded in law, and sustained by abundant evidence. Ellis on Insurance, p. 9, in case Wood vs. Masterman, "Lord Tenterden told the jury that if they thought the Plaintiff had overrated the amount or value of his loss from mere mistake or misapprehension, they would find only for

such loss or damage, as he had actually incurred, but if on the other hand they thought he had done so with fraudulent intent, they should find a verdict for Defendants." * * "As a knowledge of all the facts necessarily rests with the insured he is bound to furnish a true statement upon which he is to stand or fall." * * * "If there should be any fraud in the claim made, *or false swearing or affirming*, in support thereof, the claimant shall forfeit all benefit under such policy."

The Appellant represented that his books of account were lost, and he produced his cash book and an inventory of goods (Exhibit E) and the invoices of his purchases from the time he was in business at Richmond, and endeavored to shew by evidence of other traders, that *with them*, credit sales were generally equal to or greater than cash sales, and by this means sought to render it probable that he had on hand goods to the value, he represented in his statement (Exhibit A) £1526 14s 5d. As the equitable view of the case depends very much upon this portion of the defence, and as the evidence consists very much of calculations made upon Appellant's statements, Respondents feel necessitated to remark upon it somewhat at length. It is proper to observe in the first place, that the Respondents being a Mutual Insurance Company, almost every available witness in the locality was rendered incompetent from interest, being a member of said Company. The consequence was, that Respondents had to confine their evidence to the depositions of such accountants as they could procure, to test by computations and comparisons of Appellant's Exhibits, the correctness of his representation of loss. Vide evidence of Hollis Smith, Andrew McKay Smith, M. Bostwick, William Hopkinson and John Campbell, also statements produced with their evidence, shewing the calculations made by them.

On the 27th August, 1855, Appellant wrote Respondents (Appellant's Exhibit No. 8,) that all his goods, except £8 or £10 worth, were destroyed. On 20th September, 1855, when Appellant sought to obtain his Insurance from the Ætna Company, he made affidavit (Respondents' Exhibit W. W.) that his goods saved, only amounted to £35. After he obtatined his Insurance from the Ætna, he sold at Auction, goods saved from the fire, (Respondent's Exhibit Q. Q.) to the amount of.......................... £53 19 3

It appears from evidence and comparison of the prices for same quality of goods charged in Appellant's Exhibit A, that the Auction prices at which these goods were sold, were less than one-third of the prices at which they were charged in Exhibit A. Then add.......................... 107 16 6

Appellant charges as lost bar iron, which could not have been destroyed or materially injured, at.......................... 9 13 0

This iron is not included in goods sold at auction. Appellant also charges nails which could not have been destroyed, and which are not included in Auction bill.......... 7 14 0

By evidence of Thomas Burney on behalf of Respondents, it appears that a shew case of ribbons was saved, which were not sold at auction valued at.......................... 20 00 0

These items in the aggregate represent goods saved from the fire at the prices put upon them by Appellant, of the value of.......................... 199 7 9

These he represented to Respondents to be only worth £8 or £10, and afterwards made oath that they were only worth £35.

From the description of many of the articles sold at Auction, it is perfectly apparent that in many instances the goods charged as lost are identical with those saved from the fire, and disposed of at auction.

An examinatian of Appellant's inventory E, and his invoices, will shew that he has charged in many instances in his statement A more goods of the descriptions specified then he ever had. Take for example the item of buttons, (see Mr. Bostwick's evidence) the whole of his purchases in stock of same in inventory E, only amounted to £13 13s 1d, while he charges as lost in A for the same, £32 14s 6d. Of the item spoons, he charges £7 4s 3d more than he appears to have purchased and had altogether. He charges more for knives than all his purchases and stock when inventory was taken. Gloves and mitts, all purchases and Inventory, £33 13s 2d; charged as lost £30 11s 0d. All purchases and Inventory of Scythes, £13 1s 11d; charged as lost, £15 7s 3d. All purchases and Inventory of Stationery, £15 9s 9d; charged as lost £11 18s 9d. All purchases and Inventory of flannels £32 9s 5d; charged as lost, £42 15s 8d. All purchases and Inventory of Oil, £12 9s 0d; charged as lost, £14 2s 0d. Similar results are found respecting the greater portion of his charges for loss.

Taking a statement of his purchases of tea, tobacco and groceries, which must have found a ready sale, it is found that he charges in A as much as is contained in three or four successive invoices, while it is clear that these purchases made at different times were made to supply his stock as it was sold out.

By his statement A it would appear that that he had on hand goods worth £1526 14s 5d, besides what were saved, in all about £1700, while by his Inventory of goods when he went into the New Store, at a time when sales were more brisk, and when Railroad works were going on, he only had about £900 worth of goods. It is also worthy of remark, that at this time when by his own representation his own goods were only about £900, he held the insurance in the two Companies for £975.

Appellant's statement A is not merely inaccurate, but is not even an approximation to accuracy. It is manifestly a fabrication, and his stock is not thereby represented at all. It is a misrepresentation. It is more than exaggeration. It is a falsification.

Appellant tried to prove that Respondents were aware of the double Insurance, through Leet one of their collecting agents. Leet was only an agent for the Company for receiving policies and making collections, and his accidental knowledge of insurance with another Company, could be no notice to Respondents. Besides, at the time of Respondents' conversation with Leet, the second policy with the Ætna, and the one existing at the time of the fire, had not been made. Policy with the Ætna (paper W) dated 24th July, 1855, conversation with Leet, (see his evidence) in the fall of 1854.

The attempt on the part of Appellant to prove that credit sales exceeded cash sales, by shewing what was case with other traders, is a *non sequitur*. The Appellant was one of the mushroom traders who grew up with the railroad, whose customers were mostly railway laborers, to whom, being transitory persons, little credit was given. A comparison of his business in this respect with that of old traders, who dealt with the permanent inhabitants of the country largely upon credit, is manifestly unfair.

An attempt is made by Appellant to impeach the computations of Mr. H. Smith; by the evidence of Mr. Kingan of the firm of Kingan & Kinlock, who were creditors of Appellant in a large sum. This attempt is however a failure. When Mr. Smith commenced his deposition he had not seen Appellant's Inventory E. This occasioned some slight inaccuracies in his calculations. These are, however, subsequently corrected by his evidence and the evidence of Mr. Bostwick, and Andrew M'Kay Smith. Mr. Kingan's own statement A A A, is quite as damaging to Appellant, as Mr. Smith's, for according to his representation, while *it is possible*, though very improbable, that Appellant might have had of the items of tobacco, tea, and shawls on hand stated in A numerous other items, such as buttons, spoons, knives, bonnet silk, patent balances, screws, combs, silk shoes, playing cards, iron, locks, &c., he admits by his figures that Appellant represented as lost more than he ever had purchased since he commenced trade, and in some instances more than twice the amount, with various other items, such as gloves and mitts, scythes, stationery, flan-

nels, &c., the loss, according to him nearly equals whole amount of purchases. Kingan's object appears to be to shew that Appellant *may* have had goods destroyed exceeding £975, the amount of both policies of insurance. Respondents did not attack Appellant's statement of loss with the object of shewing that he had not £975 worth of goods lost. Such a negative they could never have hoped to prove. Their object was to convince the Court that the statement was fraudulent, and therefore vitiates Appellant's policy. The following was the judgment rendered by the Superior Court on the 27th day of March last, which Respondents feel confident must be confirmed on many grounds:

MR. JUSTICE SHORT.

"The Court having heard the parties by their respective Counsel, examined the proceedings and evidence of record, and on the whole deliberated, 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 said Defendants, were destroyed, 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 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 the said Plaintiff, on which his action in this behalf is founded, became null and void, doth maintain the exception of the said Defendants 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 said Plaintiff in this behalf with costs, distraction whereof is granted to Sanborn & Brooks, Esquires, the Defendants' Attorneys."

Dated 22nd May, 1858.

SANBORN & BROOKS,
Attorneys for Respondents.