

1893 SAMUEL NIXON (PLAINTIFF).....APPELLANT ;
 *Nov. 21. AND
 1894 THE QUEEN INSURANCE COM- } RESPONDENT.
 *Feb. 20. PANY (DEFENDANT) }

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Fire Insurance—Condition in policy—Particular account of loss—Failure to furnish—Finding of jury—Evidence.

A policy of insurance against fire required that in case of loss the insured should, within fourteen days, furnish as particular an account of the property destroyed, etc., as the nature and circumstances of the case would admit of. The property of N., insured by this policy, was destroyed by fire and in lieu of the required account he delivered to the agent of the insurers an affidavit in which, after stating the general character of the property insured, he swore that his invoice book had been burned and he had no adequate means of estimating the exact amount of his loss, but that he had made as careful an estimate as the nature and circumstances of the case would admit of and found the loss to be between \$3,000 and \$4,000.

An action on the policy was defended on the ground of non-compliance with said condition. On the trial the jury answered all the questions submitted to them, except two, in favour of N. These two questions, whether or not N. could have made a tolerably complete list of the contents of his store immediately before the fire, and whether or not he delivered as particular an account, etc. (as in the conditions) were not answered. The trial judge gave judgment in favour of N. which the court *en banc* reversed and ordered judgment to be entered for the company.

Held, affirming the decision of the court *en banc*, that as the evidence conclusively showed that N., with the assistance of his clerk, could have made a tolerably correct list of the goods lost the condition was not complied with.

Held further, that as under the evidence the jury could not have answered the questions they refused to answer in favour of N. a new trial was unnecessary and judgment was properly entered for the company.

*PRESENT :—Fournier, Taschereau, Gywnne, Sedgewick and King JJ.

APPEAL from the decision of the Supreme Court of Nova Scotia (1) setting aside a verdict for the plaintiff and ordering judgment to be entered in favour of the defendants.

1893
 NIXON
 v.
 THE
 QUEEN
 INSURANCE
 COMPANY.

The following statement of the material facts of the case is taken from the judgment of the court delivered by Mr. Justice Sedgewick :—

On the 10th December, 1889, the defendant company issued to the appellant a policy of insurance upon his stock of general merchandise contained in his store at Middleton, Annapolis County, Nova Scotia. The goods insured were burned on the 29th of May, 1891, and this action is brought to recover the amount of the insurance. One of the conditions indorsed upon the policy was the following :—

XII. Persons insured sustaining any loss or damage by fire are forthwith to give notice thereof to the Company, or to the agent through whom the insurance was effected, and within fourteen days thereafter deliver in as particular an account of their loss or damage, and of the value of the property destroyed or damaged immediately before the happening of the fire, as the nature and circumstances of the case will admit of, and make proof of the same by declaration or affirmation, and by their books of accounts, or such other reasonable evidence as the Company or its agent may require ; and until such evidence is produced the amount of such loss, or any part thereof, shall not be payable or recoverable ; and if there appear any fraud or false statement, or that the fire shall have happened by the procurement, wilful act, or means or connivance of the insured or claimants, he, she, or they shall be excluded from all benefit under this policy. No profit of any kind is to be included in such claim. And in the event of no claim being made within three calendar months after the occurrence of the fire the insured shall forfeit and be barred of every right to restitution or payment by virtue of this policy, and time shall be the essence of the contract.

It was proved at the trial that the assured did not within fourteen days after the fire or subsequently deliver to the company any particular account of his loss. The only document delivered was an affidavit of which the following is a copy :—

(1) 25 N. S. Rep 317.

1893
 NIXON
 v.
 THE
 QUEEN
 INSURANCE
 COMPANY.

I, SAMUEL NIXON, of Nictaux Falls, make oath and say as follows :—
 1. That I am the party who was owner of property which was destroyed by fire, which occurred at Nictaux Falls, in the county of Annapolis, on the morning of May 29th, 1891.

2. A part of the said property consisted of general merchandise, and said merchandise consisted principally of dry goods, boots, shoes, and groceries and hardware, contained in a 1½ storey wooden building, said building being situate on the south side of the road leading to Bridgewater, at the said Nictaux Falls.

3. Said property was, at the time the fire occurred, insured in the Queen Insurance Company, under policy no. 1253409, which policy I hold.

4. That my invoice book was burned in said fire and I therefore have no adequate means of estimating the exact value of the property covered by said insurance policy at the time or immediately before the fire occurred.

5. That I have made as careful an estimate of the value of property covered by said insurance and destroyed by said fire as the nature and circumstances of the case will admit of, and find the same to be between three thousand and four thousand (3,000 and 4,000) dollars.

6. The day after the fire occurred I mailed a notice of said fire to W. P. King, General Insurance Agent, Truro.

7. I have no knowledge as to how the said fire originated.

8. That I make this affidavit in pursuance of the directions referred to in said policy and endorsed thereon Section XII.

Sworn to at Bridgetown, in the
 County of Annapolis, this 10th day
 of June, A.D., 1891, before me,
 (Sgd.) JOHN L. Cox,
 A Justice of the Peace for the County
 of Annapolis. } (Sgd.) SAMUEL NIXON.

The defendants set up as a defence the plaintiff's failure in this regard. The case was brought on for trial before the learned Chief Justice and a jury who, in answer to the questions submitted by the presiding judge, found that the plaintiff's loss was an honest one; that he was guilty of no fraud; that the value of the goods at the time of the fire was about \$3,000; and that he gave notice of his loss pursuant to the conditions of the policy. They declined, however, to answer the following questions submitted to them by counsel for the plaintiff and defendant respectively :—

Could the plaintiff immediately after the fire, with the assistance of his clerk, Miss Robinson, or otherwise, have made up a tolerably complete list of the contents of his store immediately before the fire?

Did the plaintiff deliver to the defendant company as particular an account of his loss or damage by the said fire, and of the value of the property destroyed immediately before the happening of the fire, as the nature and circumstances of the case would admit of?

1893
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 NIXON  
 v.  
 THE  
 QUEEN  
 INSURANCE  
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Upon these findings and want of findings the learned judge gave judgment in favour of the plaintiff for the amount claimed with costs.

Upon appeal to the Supreme Court of Nova Scotia this judgment was unanimously reversed and judgment was ordered to be entered for the defendant company with costs.

The plaintiff then appealed to the Supreme Court of Canada.

*Borden* Q.C. for the appellant. The books of the plaintiff having been burnt his affidavit was sufficient compliance with the condition. *Norton v. Rensselaer & Saratoga Ins. Co.* (1); *McLaughlin v. Washington County Ins. Co.* (2). And see also *Pim v. Reid* (3).

*Harrington* Q.C. and *Mellish* for the respondents. The insured was bound to comply strictly with the condition in the policy. *Roper v. Lendon* (4); *Ripley v. Aetna Ins. Co.* (5).

As there is no evidence on which the jury could find for plaintiff a new trial will not be ordered for their refusal to answer certain questions submitted to them. *Bobbett v. South Eastern Railway Co.* (6).

The judgment of the court was delivered by :

SEDGEWICK J.—(His Lordship recited the facts of the case as stated above and proceeded as follows.)

(1) 7 Cowen (N.Y.) 645.

(2) 23 Wend. 525.

(3) 6 M. & G. 1.

(4) 1 E. & E. 825.

(5) 30 N. Y. 136; 86 Am. Dec.

362.

(6) 9 Q. B. D. 430.

1894

NIXON

v.

THE

QUEEN

INSURANCE  
COMPANY.

Sedgewick

J.

I entirely concur in the judgment of the court below. The plaintiff did not deliver as particular an account of his loss as the nature and circumstances of the case admitted of; the evidence is conclusive on this point. Although the plaintiff may not himself have been personally aware in detail of the goods destroyed by fire yet his clerk and book-keeper, one Ella Robinson, who was in charge of the store at the time of the fire, stated that she could, with plenty of time immediately after the fire, have made up a tolerably correct list, and the plaintiff himself tendered in evidence an affidavit made by her on the 24th June which describes with the most minute particularity the goods in the store at the time of the fire. The plaintiff himself, in his evidence, describes with much greater particularity than in the affidavit which he submitted immediately after the fire the goods in the store, and it is absolutely out of the question for him to say, in fact he never has said, that it was impossible for him to have given a more full or particular statement than he did. The only question in the case, it appears to me, is not as to whether the judgment of the learned judge below was erroneous, but whether, under the circumstances, a new trial should not have been ordered. We are of opinion that the court was right in the present case in ordering judgment for the defendant.

It would seem that the court, under the judicature rules, cannot enter a judgment inconsistent with the findings of the jury. In this case there is no finding; the jury expressly declined to find upon the sole question now in controversy. It was, I think, a question of fact whether the plaintiff delivered as particular an account of his loss as the nature of the case admitted of. I can conceive of cases in which it might be absolutely impossible for a claimant upon an insurance company to deliver any account whatever, but the

existence of that impossibility would be a question for the jury, but in the present case it is clear that if the jury had answered this question in the affirmative the finding would have been set aside, not only as against the weight of evidence but because the evidence is conclusively the other way.

It being apparent from the evidence that under the facts in this case it is impossible for the plaintiff to recover, and there being no findings of a jury to prevent the court from exercising its powers in this respect it was a proper exercise of the court's jurisdiction to dismiss the plaintiff's action as they did.

I think the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for appellant: *J. J. Ritchie.*

Solicitor for respondents: *T. F. Tobin.*

1894  
 NIXON  
 v.  
 THE  
 QUEEN  
 INSURANCE  
 COMPANY.  
 Sedgewick  
 J.