GLASGOW UNDERWRITERS AND OTHERS (DEFENDANTS) ..... } APPELLANTS; *May 13, 14. *Oct. 20.

AND

W. R. SMITH (PLAINTIFF) ..... RESPONDENT.

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ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Insurance—Arbitration as to amount of loss—Decision of majority binding—Statutory condition No. 22—Alberta Insurance Act, R.S.A. (1922) c. 171—Interpretation Act, R.S.A. (1922) c. 1, ss. 9, 29—Appeal—Jurisdiction—Final judgment—Supreme Court Act, s. 2, as amended by 10-11 Geo. V, c. 32.

On a submission to an arbitration of three persons under statutory condition No. 22 in schedule C to The Alberta Insurance Act, R.S.A. (1922) c. 171, to determine the amount of loss, the decision of a majority of the arbitrators is binding. Mignault J. dissenting.

In this case the appellate court while deciding that the majority of the arbitrators could render a valid award allowed an amendment of the statement of defence to the effect that the arbitrators had considered the replacement value and not the real value of the insured buildings and sent back the case for trial upon this issue.

Held, per Mignault J., that such a judgment was a final judgment within the meaning of s. 2 of the Supreme Court Act as amended by 10-11 Geo. V, c. 32.

Judgment of the Appellate Division (20 Alta. L.R. 114) affirmed, Mignault J. dissenting.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of Ives J. who affirmed an order of Clarry M.C. refusing the respondent's motion for judgment on the ground that the amount of loss, which it was necessary should be fixed by arbitration, had not been so fixed inasmuch as the award set up by the plaintiff was made by but two of three arbitrators and was consequently invalid as an award.

The appellant insurance companies issued policies of insurance against loss or damage by fire for a total amount of $5,000 on a building owned by respondent. The building and contents were totally destroyed by fire. Each of the policies was subject to the statutory conditions of The Alberta Insurance Act. The respondent claiming that differ-

*PRESENT:—Idington, Duff, Mignault and Malouin JJ. and Maclean J. *ad hoc.*

Reporter's Note.—Mr. Justice Malouin resigned before the date of the judgment.

(1) [1923] 20 Alta. L.R. 114; [1924] 1 W.W.R. 155.

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ences had arisen between himself and the appellants as to the value of the property insured and the amount of the loss, these questions were referred to arbitration, pursuant to the provisions of statutory condition no. 22. The respondent and the appellants each appointed an arbitrator, and the two so appointed selected a third arbitrator. The three arbitrators were unable to agree, and an award was made by two of them only. Immediately after the award was made, the present action was commenced by the respondent for the recovery of the amounts awarded against the several appellants. The appellants allege that the arbitrators have not made any award and claim that the document signed by the two arbitrators is not an award of the arbitrators, as it was made and signed by two arbitrators only, and not by three arbitrators as required by statutory condition 22, and by the Arbitration Act of the province of Alberta. The appellant then applied to the Master in Chambers for an order striking out these and certain other paragraphs of the defence relating to the arbitration and award. The Master in Chambers dismissed the application. An appeal was then taken by the respondent to a judge in chambers, and the appeal was heard by the Honourable Mr. Justice Ives, by whom it was dismissed. The respondent then appealed to the Appellate Division of the Supreme Court of Alberta. The appeal was allowed, and the paragraphs of the defence struck out.

Lafleur K.C. for the appellants.
Bennett K.C. for the respondent.

IDINGTON J.—For the reasons assigned by Mr. Justice Stuart and Mr. Justice Beck, with which I fully agree, I think this appeal should be dismissed with costs.

I cannot imagine that all the members of the legislature were entirely ignorant of the numerous decisions prior to the enactment now in question and now relied upon herein by the appellants, and intended, when imposing the legislative condition, now in question herein, upon every fire insurance contract that it might be nullified at the will of either party by appointing a partizan arbitrator who was ready to refuse to sign the award agreed upon.

I would rather attribute to the legislature some knowledge of the existent law and that it intended to enact some-

thing useful as this enactment evidently would be if upheld as it has been by the Appellate Division.

Hence I concur in the reasons that court has given.

To say that it might have been made more clear is no answer if the language used is capable of the construction so given it, as I hold it is.

Nor is it any answer to suggest that the insured and insurers might have entered into an entirely different contract, distinctly discarding all legislation on the subject of fire insurance.

The respondent's counsel relied somewhat upon the Interpretation Act in the Revised Statutes of Alberta, 1922, citing s. 29 of c. 1 thereof, which reads as follows:—

29. Whenever by any Act anything is required to be done by more than two persons a majority of them may do it.

I think that certainly supports the contention of respondent and removes all doubt, for the condition in question is, by the very terms of the Insurance Act, part thereof when the Insurance Act is adopted as the basis of the policy in question herein.

Section 9 of the said Interpretation Act supports also that way of interpreting and applying said Act.

I am of the opinion that this appeal for the foregoing reasons should be dismissed with costs.

DUFF J.—The question is one of difficulty, and I am unable to say that I am entirely satisfied with the conclusion at which I have arrived. It is, however, the same in effect as the view taken by the Appellate Division in Alberta; and on the whole I think the considerations in favour of it ought to preponderate over those which can be adduced in opposition to it.

It has been laid down more than once, and it was expressly held by Mathew J., in *United Kingdom Mutual Steamship Assur. Assc.* v. *Houston* (1), that where, in an instrument *inter partes,* persons are named to do an act of private concern only, they all must concur in doing the act if it is to be validly done; and that this principle applies where by agreement the parties have provided for the determination of disputes between them by three arbitrators, one to be nominated by each of the parties, and the third to be

(1) [1896] 1 Q.B. 567.

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selected in some other way, where it is quite clear that the third person so selected is an arbitrator, and not an umpire. Now it is argued, and there is a great deal of force in the argument, that the Alberta Insurance Act, c. 171, R.S.A., 1922, in laying down (ss. 69 *et seq.*) that certain conditions, usually called "statutory" conditions, set forth in schedule "C" of the Act are a part of every contract of fire insurance, unless otherwise provided for, in the form and manner prescribed by the statute, is merely annexing to the contract certain contractual stipulations which must take effect and must be construed and interpreted as stipulations *inter partes;* although, admittedly, subject to the right of variation reserved by the statute, these contractual conditions are imposed *ab extra* by the law, and only indirectly come into operation through the consent of the parties. The rule, therefore, above referred to, governing arbitration in matters of private concern and provided for by private documents taking effect *inter partes* only, it is argued, is the rule which must be applied in ascertaining the construction and effect of condition 22.

As against this it is said, to quote the language of an eminent judge, Mr. Justice Lawrence, in *Withnell* v. *Gartham* (1):

> In general, it would be the understanding of a plain man that, where a body of persons is to do an act, a majority of that body would bind the rest;

and that to construe the condition in conformity with the rule would probably have the effect of defeating the intention of the legislature, whose interpretation of its own language is probably best to be gathered from the provision of the Interpretation Act, expressed in these words:

> Where by any act anything is required to be done by more than two persons, the majority of them do it. (R.S.A., 1922, c. 1, s. 29).

I am disposed to think that, strictly, this clause of the Interpretation Act does not apply. While I agree with the view of Boyd C., to which he gave effect in his decision in *Re Harding* (2), that a thing prescribed by statute as a condition of the acquisition of a right given by statute may very well be a thing "required to be done," within the meaning of the Interpretation Act, I think it requires some straining of the language to bring the provision of condition

(1) [1795] 6 T.R., 388 at p. 398. (2) [1889] 13 Ont. P.R. 112.

22 within the description "anything required to be done" by "an Act of the legislature."

This, however, by no means concludes the matter. The rule of construction, upon which Matthew J. acted, is not an absolutely rigorous rule in the sense that only an express provision to the contrary can vary it. It is not a rule which has had the effect of imparting to the language of such a clause a generally recognized meaning in the sense of the rule; it is not a rule of interpretation which has become recognized in common speech. It is strictly a rule of law which gives way when inconsistent with the intention of the author of the instrument as gathered from the language or from the nature of the subject matter or from the circumstances in which the power is to be put into execution. In *Grindley* v. *Barker* (1), Buller J., said:

> One thing is clear from this authority

(referring to *Withnell* v. *Gartham*) (2),

> that a deed which speaks in general terms, giving a power to a certain number of persons, does not necessarily import that all these persons shall concur;

and he adds:

> The case, therefore, is open to the argument of inconvenience;

and in that case one distinction was recognized as well settled, which is expressed in these words by Eyre C.J., at p. 236:

> I think it is now pretty well established that where a number of persons are entrusted with powers * * * in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole.

The opinions of Lord Cairns and Lord Selborne in relation to the arbitration between Ontario and Quebec under sec. 142 of the British North America Act illustrate the application of the principle (3).

The provision of the Interpretation Act above quoted seems to treat the principle as applicable in all cases where arbitration machinery is set up by statute, and I think this may fairly be considered a recognition that such would be the interpretation of such statutory provisions by Mr. Justice Lawrence's "plain man."

While it is quite true that in form the statutory conditions of the Insurance Act are contractual stipulations,

(1) [1798] 1 B. & P. 229. (2) 6 T.R 388.
(3) *In re Ontario and Quebec Arbitration*, 4 Cartwright 712.

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and while I agree that as a rule they must be construed and given effect to as stipulations *inter partes*, it is nevertheless also true, as pointed out by Mr. Justice Beck in the court below, that the parties are not entirely free as to variations, such variations taking effect only to the extent to which the court considers them reasonable; and as regards the insured, upon whom the statutory conditions are binding unless effectively varied (*The Citizens Ins. Co. of Canada* v. *Parsons* (1), one cannot fairly ascribe to the legislature ignorance of the fact that as a rule, when the conditions do take effect as against him, they take effect quite independently of any choice exercised in fact on his part, and by force by the statute.

The fact that the legislature has dealt with the subject of insurance contracts in this way seems in itself to imply that such contracts are affected with a public interest, and the fact that the condition in question derives its existence from this legislative intervention seems to afford some substantial ground for bringing into play the principle laid down by Eyre C.J. For these reasons I would dismiss the appeal with costs.

MIGNAULT J. (dissenting).—The respondent objects to our jurisdiction to hear this appeal on the ground that the judgment appealed from is not a final judgment.

The action claims indemnity under several fire insurance policies alleging that as required by the conditions of each policy an arbitration had taken place and that the majority of the arbitrators had awarded him the amount claimed. The defence is that the three arbitrators not having agreed on the award the decision relied on by the respondent is not binding on the appellants.

The respondent moved before the master for leave to enter judgment against the appellants for the amount of his claim, but his motion was dismissed on the ground that the award was void because all the arbitrators had not joined in it.

This decision was affirmed on appeal by Mr. Justice Ives from whose judgment the respondent appealed to the Appellate Division of the Supreme Court of Alberta. The appellants had also moved for leave to amend their state-

(1) [1881] 7 App. Cas. 96, at pp. 121 and 122

ments of defence by alleging, as a further ground of nullity of the award, that the majority of the arbitrators had granted the respondent the replacement instead of the real value of his buildings.

The judgment of the Appellate Division reversed the judgment of Mr. Justice Ives and set aside the master's order. It also allowed the amendment.

The effect of this latter judgment is that the award is held to be validly rendered, although all the arbitrators did not join therein, but the appellants are allowed to amend their defence so that the case goes back for trial. Under these circumstances, the respondent contends that the judgment appealed from is not a final judgment from which an appeal lies to this court.

"Final judgment" is defined by s. 2 of the Supreme Court Act, as amended by 10-11 Geo. V, c. 32, as meaning any judgment, rule, order or decision which determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding.

I think the judgment which holds that the award could be rendered by two of the arbitrators, without the concurrence of the third, determines a substantive right of the respondent within the meaning of this section, and is therefore a final judgment appealable to this court. The objection of the respondent fails.

Coming now to the merits, the question to be determined is whether, under the conditions of the policies, the so-called award rendered by two of the arbitrators without the concurrence of the third is conclusive and binding on the parties.

Condition 22 of the policies, which is one of the statutory conditions under the Alberta Insurance law, is as follows:

If any difference arises as to the value of the property insured, the property saved, or the amount of the loss, such value and amount and the proportion thereof (if any) to be paid by the company, shall, whether the right to recover on the policy is disputed or not, and independently of all other questions, be submitted to the arbitration of some person to be chosen by both parties, or if they cannot agree on one person, then to two persons, one to be chosen by the party insured and the other by the company, and a third to be appointed by the persons so chosen, or in their failing to agree, then by a judge of the district court of the district in which the loss has happened; and such reference shall be subject to the provisions of "The Arbitration Act," and the award shall, if the company is in other respects liable, be conclusive as to the amount of the loss and the proportion to be paid by the company; where the full amount

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of the claim is awarded the costs shall follow the event, and in other cases all questions of costs shall be in the discretion of the arbitrators.

There is no provision here for a majority award. The reference to The Arbitration Act (R.S.A., c. 98) is of no help, for the condition does not provide for the appointment of an umpire, and the provisions of schedule A which would allow the naming of an umpire do not apply because the reference is not to two arbitrators, but to one, and if the parties cannot agree on one person, then to two persons, one chosen by the assured and the other by the company and a third appointed by the two, or if they fail to agree, by a judge of the district court. This is a submission to three arbitrators, and not to two arbitrators and an umpire. It follows that no award can be rendered unless all the arbitrators join therein. (See cases cited in Russell on Arbitrations, 10th ed. pp. 408, 409).

I may add that in the report of their Lordships of the Privy Council on the reference to them of certain questions arising under *The Irish Free State Agreement Act, 1922,* better known as *The Irish Boundary Commission Case,* which I find in the London Times of August 2nd, 1924, p. 15, their Lordships say:

> Although in private arbitrations unanimity is necessary, it is otherwise when the matter to be determined is of public concern.

This is undoubtedly a private arbitration resulting from a contract of a private nature; and, in the absence of any clause giving to the majority of the arbitrators the power to make an award, no decision of the arbitrators is binding on the parties unless all the arbitrators join therein.

The argument that this is a statutory condition or that it is a contract which the statute makes for the parties does not appear to be conclusive. The parties can vary any of the statutory conditions by agreement and if they do not do so effect must be given to these conditions as in an ordinary contract. I could not therefore say that condition 22 is practically, as Mr. Justice Stuart suggests, a legislative enactment. Nor do I think that s. 29 of the Alberta Interpretation Act relied on by the respondent can be appealed to in order to read into the condition a provision for a majority award.

This does not mean that the respondent has no remedy. He can ask the court to determine the value of the de-

stroyed property, the submission to arbitration having proved abortive. I may perhaps be permitted to cite here what Lord Shaw of Dumfermline, speaking for the Judicial Committee, said in *Cameron* v. *Cuddy* (1):

> When an arbitration for any reason becomes abortive, it is the duty of a court of law, in working out a contract of which such an arbitration is part of the practical machinery, to supply the defect which has occurred. It is the privilege of a Court in such circumstances and it is its duty to come to the assistance of parties by the removal of the impasse and the extrication of their rights. This rule is in truth founded upon the soundest principle, it is practical in its character, and it furnishes by an appeal to a court of justice the means of working out and of preventing the defeat of bargains between parties. It is unnecessary to cite authority on the subject, but the judgment of Lord Watson in *Hamlyn & Co.* v. *Talisker Distillery* (2) might be referred to.

It would seem very desirable that the legislature should amend statutory condition 22 so as to provide for a majority award. In the province of Quebec, the arbitration condition refers to the code of civil procedure which permits a majority of the arbitrators to make an award. (Article 1441). There is no reason why the condition should not be made to operate in the same manner elsewhere.

On the ground therefore that the so-called award is invalid, I would, with respect, allow the appeal with costs here and in the appellate court and restore the judgment of the learned trial judge. The case must go back for trial and, the submission to arbitration having proved abortive, the trial court will determine the value of the property insured and the amount of the loss.

MACLEAN J.—Upon the conclusion of the argument I was strongly of the view that the appeal should prevail. However, upon a further and careful review of the reasons for judgment rendered in the Appellate Division, and after a careful consideration of the judgment prepared by Mr. Justice Duff which I have had the privilege of reading, I have reached the conclusion, though not quite free from doubt, that the judgment of the court below should be sustained. I adopt the line of reasoning to be found in the judgment of Mr. Justice Duff, and cannot usefully add thereto.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Savary, Fenerty & McLaurin.*
Solicitors for the respondent: *Charman & Corey.*

(1) [1914] A.C. 651, at p. 656. (2) [1894] A.C. 202.