THE ANCHOR MARINE INSURANCE COMPANY..... } APPELLANTS. 1881 *Nov. 8.

AND

FREDERICK D. CORBETT, ASSIGNEE...RESPONDENT. 1882 *March 8.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Marine insurance—Policy, conditions in, as to default in payment of premium, effect of—Premium note, guarantee of, in case of insolvency—Condition precedent—Reference to arbitration—Award, effect of.

W. et al effected in A. M. Ins. Co. a policy of insurance on a ship. The policy among other clauses contained the following: "In case the premium, or the note, or other obligation given for the premium, or any part thereof, should be not paid when due, this

*PRESENT.—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Taschereau, JJ.

1881

ANCHOR MARINE INS. CO. v. CORBETT.

insurance shall be void at and from such default; but the full amount of premium shall be considered as earned, and shall be payable, and the insurer shall be entitled to recover for loss or damage which may have occurred before such default. Should the person or any of the persons liable to the company for the premium, or on any note or obligation given therefor, or any part thereof, fail in business or become bankrupt or insolvent before the time for payment has arrived, this insurance shall at once become and be void, unless and until before loss the premium be paid or satisfactorily secured to the company."

There was also in the policy an arbitration clause by which arbitrators were to decide any difference which might arise between the company and the insured "as to the loss or damage or any other matter relating to the insurance" in accordance with the terms and conditions of the policy and the laws of *Canada*, and the obtaining of the decision of the arbitrators was to be a condition precedent to the maintaining of an action by the insured against the company.

W. et al gave a promissory note for the premium, which was not yet due when they became insolvent: and *C.*, the respondent, was appointed assignee. A guarantee was then given and accepted by the company as a satisfactory security for the premium. The note became due on the 30th September, 1878, and was not paid but remained overdue and unpaid at the date of the loss on the 12th of October, 1878. After the loss the matters in dispute arising out of the policy were submitted to three arbitrators, who awarded $5,769.29. An action was then brought on the policy, the declaration containing a count on the award.

Held,—1. (Affirming the judgment of the court below), That the premium having, on the insolvency of the insured, been satisfactorily guaranteed to the company, the policy was thereby kept in full force and effect and did not become void on non-payment of the premium note at maturity. (*Strong*, J., dissenting.)

2. That the award was binding on the company, the question as to the payment or default in payment of the premium being a difference "relating to the insurance" within the meaning of the policy, and the award not appearing on its face to be bad from any mistake of law or otherwise.

APPEAL from the judgment of the Supreme Court of *Nova Scotia* in favor of the plaintiff, upon a special case stated for the opinion of the court. The case is hereafter set out in the judgment of *Ritchie*, C.J.

1881

ANCHOR MARINE INS. CO. v. CORBETT.

Mr. *MacLennan*, Q.C., for appellants:—

The premium note was not paid when it became due, nor at any time afterwards. It became due on the 30th September, 1878, and the loss occurred on the 12th October following. Under these circumstances the policy became void under the provisions of the first clause of the policy.

The judgment proceeds upon a misapprehension of the scope and effect of the clauses of the policy. There are two clauses providing for totally different contingencies; one providing for the case of the premium note being dishonored at maturity, the other for the case of failure in business, bankruptcy, or insolvency of the obligor while the note is current. These clauses are distinct in themselves, and provide for totally distinct contingencies. If the obligor of the note fails in business, &c., then, by virtue of the second clause, the policy is at once suspended, unless and until, before loss, the premium is either paid or secured. It is suspended, but it may be revived by payment or security. If that is done, before loss, the policy is re-established, and goes on as before, as if no failure or bankruptcy, &c., had happened. If the premium is paid both clauses cease to be of any importance, but if the premium is only secured, the other clause remains in full force, and unless the premium is paid at maturity, the policy is to become void.

In the present case, when the failure happened a guarantee was given. That had the effect of reviving and re-establishing the policy, and it went on as before. The effect of the failure or bankrutcy was got rid of, and, from the time of giving the guarantee, until the note fell due, the policy was in full force. It was, however, still necessary that the premium note should be paid at maturity, otherwise the policy was to be void under the other clause. There can be no ground for

1882

ANCHOR MARINE INS. CO. v. CORBETT.

contending that the occurrence of the bankruptcy and the giving of a guarantee dispensed with the payment at maturity, or with the condition avoiding the policy upon default. Every reason is the other way; there are no words in the clauses favoring that view; the guarantee expressly undertakes to see the note paid, and it is only fair that the company should be relieved from further risk on default being made in payment of the premium.

The acknowledgment of payment in the policy cannot exclude the condition relied on. The company accepted the note as payment, but there is nothing in that to prevent the parties agreeing that if the note is not paid when due the policy shall be void.

Mr. *Rigby*, Q.C., for respondent:

The award of the arbitrators is conclusive, and the appellants cannot go behind it. *Russell* on Arbitration (1); *Hodgkinson* v. *Fernie et al.* (2); *Cummings* v. *Heard* (3).

In order to entitle the appellants to impeach the award, they should have made the submission a rule of court and moved to set aside the award, and not having done so, the court cannot in this suit review the award, nor entertain any question as to whether the arbitrators decided properly or not in point of law or otherwise. *Delver* v. *Barnes* (4).

The appellants, by entering into the reference and proceeding with it, recognized the policy as being still in force, and cannot claim that it is invalid. If the policy was void, by reason of non-payment of the premium, or from any other cause, there was nothing to refer. The alleged non-payment of the premium was contested and enquired into before the arbitrators, and their finding

(1) P. 476.
(2) 3 C. B. N. S. 189.
(3) L. R. 4 Q. B. 668.
(4) 1 Taunt. 48.

thereon was against the appellants, and such finding was conclusive, and is not reviewable in this suit.

The guarantee was given to secure the payment of the premium, and was not a guarantee to pay the note at maturity, and such guarantee was equivalent to actual payment of the premium.

By the giving of the guarantee in question, the payment of the premium was satisfactorily secured to the appellants, and there is no provision in the policy or in the guarantee making the policy void upon non-payment of this guarantee.

It was the duty of the appellants to have demanded payment of the guarantee, especially as it was not a guarantee to pay the note at maturity.

The appellants are estopped from asserting that the premium was not paid, inasmuch as the policy, which is under the seal of the defendant company, expressly acknowledges the payment thereof. *Arnold* on Marine Insurance (1); *Anderson et al.* v. *Thornton* (2); *Roscoe's Nisi Prius* (3).

RITCHIE, C.J.:—

This was an action upon a policy of insurance, issued by defendants to *Weir Bros. & Co.*, with a count upon an award.

The said policy was issued on the 27th day of June, A. D. 1878, and was sealed with the common seal of said defendant company, and duly signed by its authorized officers.

It was a policy for the sum of $6,000 on the schooner "*Mabel Clare*," from the port of *Liverpool*, trading to *Labrador* and back to *Liverpool*, with permission to use the *Newfoundland* coast.

The said policy contained, amongst others, the following clauses:

(1) 5th Edition, 195. (2) 8 Exch. 425.
(3) 13th Edition 70, and cases cited there.

1882

ANCHOR MARINE INS. CO. v. CORBETT.

Ritchie, C.J.

The said company hereby acknowledges the receipt of two hundred and ten dollars as the premium or consideration for this insurance, being at and after the rate of three and one-half per cent., and in case the premium, or the note, or other obligations given for the premium, or any part thereof, be not paid when due, this insurance shall be void at and from such default; but the full amount of premium shall be considered as earned, and shall be payable, and the insured shall be entitled to recover for loss or damage which may have occurred before such default. Should the person or any of the persons liable to the company for the premium or on any note or obligations given therefor, or any part thereof, fail in business or become bankrupt or insolvent before the time for payment has arrived, this insurance shall at once become and be void, unless and until before loss the premium be paid or satisfactorily secured to the company.

In making payment, the company may deduct any sum remaining unpaid on account of premium, whether the claimant be legally liable to the company therefor or not, and whether the time for payment has or has not arrived, and whether the obligation therefor be or be not outstanding in the hands of persons other than the company, and may also deduct all other indebtedness of the insured or the claimant to the company, but the company shall save harmless, and indemnify the insured against any outstanding obligation for premium to the extent of any deductions made in respect thereof.

If any difference shall arise between the company and the insured as to the loss or damage or any other matter relating to the insurance in such case, the insured shall appoint an arbitrator on his or her behalf, and the company shall appoint another; and if the company refuse for fourteen days after notice of the appointment of his arbitrator by the insured to appoint another, the insured may appoint a second, and in either case the two appointed shall forthwith appoint a third, which three arbitrators, or any two of them, shall decide upon the matters in dispute, in accordance with the terms and conditions of this policy and the laws of *Canada*. Provided always, and it is hereby expressly agreed between the company and the insured, that the insured shall not be entitled to maintain any action at law or suit in equity on this policy until the matters in dispute shall have been referred to, and settled by arbitrators, appointed as hereinbefore specified, and then only for such sum as the arbitrators shall award; and the obtaining of the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of the insured to maintain any such action or suit.

1882

ANCHOR MARINE INS. CO. v. CORBETT.

Ritchie, C.J.

When insurance was effected a promissory note was given for the premium by the insured.

[$210.] *Halifax, N.S.*

Three months after date we promise to pay to the order of the Secretary of the Anchor Marine Insurance Company, of *Toronto*, at the bank of *British North America*, at *Halifax*, the sum of two hundred and ten dollars, value received in Policy No. 142.

(Signed) *Wier* Bros. & Co.

On the 7th of September, 1878, *Wier Bros. & Co.* became insolvent, and an attachment was issued against them under the Insolvent Act of 1875.

On the 6th of August, 1878, the defendants, in consequence of *Wier Bros. & Co.'s* failure, demanded and obtained from them, under the terms of the policy, a guarantee as follows:—

Halifax, 6th August, 1878.

H. N. Paint, Esq., Secretary Anchor Marine Insurance Company:

DEAR SIR: We hereby guarantee you the payment of $210 premium of insurance on schooner "*Mabel Clare*," under Policy No 143, and for which you hold the note of *Wier Bros. & Co.*

Yours truly,

(Signed) *Jno. Smith*,
William E. Wier,
Guardians of estate of *Jos. Wier*.

December 18th, 1880.

The said note was duly presented and protested for non-payment on the 30th of September, A.D. 1878, the protest thereof being in due form.

The said guarantee was never paid, and is now held by the defendant company. It was never returned or offered to the makers, nor was it ever demanded by them, nor did the defendants ever demand payment thereof.

The said vessel was wholly lost by perils of the seas insured against by said policy on the 12th day of October, A.D. 1878, and no question is raised as to the sufficiency of the proof of loss or interest, or adjustment.

1882

ANCHOR MARINE INS. CO. v. CORBETT.

Ritchie, C.J.

Disputes having arisen, three arbitrators were appointed in compliance with the terms and conditions of the policy to decide upon and settle the matters in dispute arising out of said policy; these arbitrators made the following award:

TO ALL TO WHOM THESE PRESENTS SHALL COME:

We, *Harris H. Bligh*, of the city and county of *Halifax*, barrister-at-law; *Robert Sedgewick*, of the same place, barrister-at-law; and *John T. W. Wylde*, of the same place, merchant,

Whereas, in and by a certain policy of insurance, No. 142, bearing date the 27th day of June, in the year of our Lord, 1878, upon the body, tackle, apparel and other furniture of the ship or vessel called the schooner "*Mabel Clare*," executed by the Anchor Marine Insurance Company in favor of Messrs. *Wier Brothers & Co.*, of *Halifax*, *Nova Scotia*, * * * * it was among other things provided and agreed that if any difference should arise between the said insurance company and the insured, as to the loss or damage or any other matter relating to the insurance in such case, three arbitrators should be appointed, which three arbitrators, or any two of them, should decide upon the matters in dispute in accordance with the terms and conditions of said policy and the laws of *Canada*.

And whereas, we, the undersigned, have been appointed the three arbitrators, in compliance with the terms and conditions of said policy, to decide upon and settle the matters in dispute arising out of said policy,—

Now know ye that we, the said arbitrators, having taken upon ourselves the burthen of the said arbitration, and having heard, examined and considered the witnesses and evidence brought before us by and on behalf of the said parties in difference, and having fully examined into the claims, under the said policy respectively, do make and publish this our award of and concerning the same in manner following, that is to say:

We do award and determine that the loss of said vessel was a total loss, and was *bonâ fide* and without fraud. That upon the said policy No. 142 the said *F. D. Corbett*, as assignee of the said *Weir Brothers & Co.*, under the provisions of the Insolvent Act of 1875, has a just and valid claim and demand against the said The Anchor Marine Insurance Company for the sum of five thousand seven hundred and sixty-five dollars and twenty-nine cents, which sum of $5,765.29 is made up in the following manner:

Amount insured		$6,000 00
Deduct amount received from proceeds..		250 02
		5,749 98
Add interest from 14th January, 1879....		237 65
		$5,987 63
Deduct premium note	$210 00	
Add interest from 30th September, 1878	12 34	
		222 34
		$5,765 29

which sum of five thousand seven hundred and sixty-five dollars and twenty-nine cents we do award and determine that the said *The Anchor Marine Insurance Company* do pay to the said *F. D. Corbett* as such assignee, as aforesaid, which sum shall be so paid, accepted, and taken in full satisfaction and discharge of and upon said Policy No. 142.

* * * * * * * *

(Signed) *Harris H. Bligh,*
Robert Sedgewick,
John T. Wylde, } *Arbitrators.*

Fees, $120.

Halifax, September 22nd, 1879.

The facts before set forth were proved before the arbitrators on the part of the defendant company, and they are now admitted by the plaintiff to be correct, and to form part of this case, provided the defendant company can avail itself of them as an answer to plaintiff's claim.

The question submitted is as follows: "If upon the foregoing statement of facts the court shall be of opinion that the plaintiff is entitled to recover on said award or policy, then judgment shall be entered for him for the sum of five thousand seven hundred sixty-five dollars and twenty-nine cents, the amount of said award, with interest at six per cent. from the date of said award, with costs, otherwise judgment is to be entered for the defendant, with costs."

The first section of the clause, in my opinion, applies simply and solely to the case of a party who, on the falling due of a note given for the premium, fails to

1882

ANCHOR MARINE INS. CO. v. CORRETT.

Ritchie, C.J.

pay it at maturity, in which case there is an end of the policy.

The second section provides precisely for the present case, viz: When a note or obligation has been given for the premium and the person or any of the persons liable on any such note or obligation "fail in business or become bankrupt or insolvent before the time of payment has arrived," then, and in such a case, the insurance "shall at once become and be void, unless and until before loss the premium be paid or satisfactorily secured to the company." The makers of the promissory note in this case became insolvent before the time of payment had arrived, and the guardians of the estate of the insolvent satisfactorily secured the premium to the company, and so the terms of the policy were complied with—and from that time the company relied on the security so taken for payment of the premium as if no note had been taken, and I can discover no pretence for saying that from the time the premium was so secured to the satisfaction of the company until and at the time of the loss the policy was not in full force and effect. The company still held the guarantee and have never attempted to realize on it, and it does not appear that they could not have done so had they chosen to seek its enforcement, but whether the security was good or bad they elected to accept it.

As to the effect of the award, in *Forwood* v. *Watney* (1) the contract contained the following arbitration clauses: "Should any dispute arise, the same to be submitted for settlement to the arbitration of two *London* corn factors, respectively chosen, whose

(1) 49 L. J. Q. B. 447.

See particularly *Collins* v. *Locke* 4 App. Cases 674; also *Moffatt* v. *Cornelius*, 39 L. T. N. S. 102, affirmed, 26 W. R. 914; see also *Law* v. *Garrett*, 8 Ch. Div. 26, affirming 57 L. T. N. S. 602; *Plews* v. *Baker*, L. R. 16 Eq. 564. Prospective agreements of reference: *Dawson* v. *Lord Otto Fitzgerald*, L. R. 9 Exch. 7.

decision shall be final and binding." Held, that the clause in question formed part of consideration for contract and was intended to include questions of law as well as questions of fact which might arise upon the construction of the contract."

In *Hodgkinson* v. *Fernie* (1) *Cockburn*, C.J., says:

It is not easy to reconcile all the decisions as to how far the court will interfere with the determination of an arbitrator, whether upon the law or upon the facts. But the modern cases which have been cited certainly go the length of deciding, that unless there be something upon the face of the award to show that the arbitrator has proceeded upon grounds which are not sustainable in point of law, the court will not entertain an objection to it. *Flaviell* v. *The Eastern Counties Railway Company* (2) is very much to the purpose. The parties have selected their own tribunal, and they are bound by the decision, be it right or wrong.

Williams, J.:

The law has for many years been settled, and remains so at this day, that, when a cause or matters in difference are referred to an arbitrator, whether lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. You have constituted your own tribunal; you are bound by its decision.

In *Hart* v. *Hart* (3), *Kay*, J.:

In the case of *Milnes* v. *Gery* (4) the agreement was for sale according to the valuation of two persons, one to be chosen by each side, or an umpire appointed by the two in case of disagreement. They differed in their estimate, and were not able to agree upon a third person, and in that case it was decided that the agreement could not be specifically performed. The ground is put thus by Sir *William Grant* in giving his judgment: "The only agreement into which the defendant entered was to purchase at a price to be ascertained in a specific mode. No price having ever been fixed in that mode, the parties have not agreed upon any price. Where then is the complete and concluded contract which the court is called upon to execute?" Surely you may put the reason of that decision briefly thus: The contract which the court is called upon to execute is not a complete contract; but it is an agreement that a contract should be made. The court cannot enforce an agreement that

(1) 3 C. B.N. S. 189.
(2) 2 Exch. 344.
(3) 18 Ch. Div. 688.
(4) 14 Ves. 400.

1882

ANCHOR MARINE INS. CO. v. CORBETT.

Ritchie, C.J.

a contract should be made; the contract must be complete. Reference is also made to the case of *Darbey* v. *Whitaker* (1) which is essentially the same as *Milnes* v. *Gery*. Those were the decisions upon which the case of *Tillet* v. *Charing Cross Bridge Co.* (2) proceeded. Therefore, I have no doubt, the meaning of that decision was this: that under the particular terms of that contract there was not a complete and concluded agreement, but it was essential in order to complete and conclude the agreement that a further agreement between the company and Messrs. *Tillett*, or failing them, the arbitration of the named persons should have taken place; and until that was done, there was nothing which the court could enforce, that being the essential term of the agreement. That is entirely consistent with the case of *Scott* v. *Avery* in the House of Lords (3). The facts were these: "*A*, effected in a mutual insurance company a policy of insurance on a ship, one of the conditions of which was that the sums to be paid to any insurer for loss should in the first instance be ascertained by the committee, but if a difference should arise between the insurer and the committee relative to the settling of any loss or to a claim for average * * * that was to be referred to arbitration in a way pointed out in the conditions; provided that no insurer who refuses to accept the amount settled by the committee shall be entitled to maintain any action at law or suit in equity on his policy, until the matter has been decided by the arbitrators, and then only for such sum as the arbitrators shall award." The obtaining of the decision of the arbitrator was declared to be a condition precedent to the maintaining of an action. It is quite clear, according to the terms of the contract, that as no action could be brought except for such a sum as the insurer was entitled to under the award, until the sum was settled there was no cause of action whatever. That case was followed in *Scott* v. *Corporation of Liverpool* (4), where the surveyor was to determine the amount payable, and until he had made that determination there was no sum which could be sued for.

All these cases seem to me to proceed on one and the same principle—a very simple and intelligible principle—that where the agreement on the face of it is incomplete until something else has been done, whether by further agreement between the parties, or by the decision of an arbitrator, this court is powerless, because there is no complete agreement to enforce.

Applying that rule to this case, I find here an agreement which, on the face of it, is quite complete: the arbitrators are not to com-

(1) 4 Drew. 134.
(2) 26 Beav. 419.
(3) 5 H. L. C. 811.
(4) 3 DeG. & J. 334.

plete this agreement; they are not to supplement any defect in it; that is not the purpose for which they are appointed; but the thing they are appointed to do is merely this, that in case of difference in working out these terms the matter is to be referred to them."

I am therefore of opinion that the appeal should be dismissed with costs.

STRONG, J.:—

This was an action upon a policy of marine insurance, and the declaration contained a count on the award hereafter to be mentioned. It came before the court below in the form of a special case stated for its opinion; it being agreed that if the court should be of opinion that the plaintiff was entitled to recover on the award or policy, then judgment should be entered for him for the sum of $5,765.29, the amount of the award, with interest at 6 per cent from the date of the award, with costs, otherwise judgment was to be entered for the defendant, with costs.

The court below was of opinion that the plaintiff was entitled to recover, and there was a rule to enter judgment accordingly.

The policy which was executed by the appellants in favor of Messrs. *Wier Bros. & Co.*, was dated the 27th June, 1878, and was upon the schooner "Mabel Clare" for $6,000. The vessel was lost on the 12th of October, 1878, and no question was raised as to the sufficiency of proof of loss or interest. The policy contained (amongst others) the following conditions:

That in case the premium or the note or other obligation given for the premium or any part thereof be not paid when due, this insurance shall be void at and from such default. And should the person liable for the premium, or on any note or obligation given therefor, fail in business or become bankrupt or insolvent before the time for payment has arrived, this insurance shall at once become and be void unless and until before loss the premium be paid or satisfactorily secured to the company.

1882

ANCHOR MARINE INS. CO. v. CORBETT.

Strong, J.

There was also in the policy an arbitration clause as follows:

If any difference shall arise between the company and the insured as to the loss or damage, or any other matter relating to the insurance, in such case the insured shall appoint an arbitrator on her or his behalf, and the company shall appoint another.

Then follows a provision for the appointment of a third arbitrator, and the condition proceeds:

Which three arbitrators or any two of them shall decide upon the matters in dispute in accordance with the terms and conditions of this policy and the laws of *Canada;* Provided always, and it is hereby expressly agreed between the company and the insured, that the insured shall not be entitled to maintain any action at law or suit in equity on this policy until the matters in dispute shall have been referred to and settled by arbitrators appointed as hereinbefore specified, and then only for such sum as the arbitrators shall award; and the obtaining the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of the insured to maintain any such action or suit.

A promissory note was given by *Wier Bros. & Co.*, for the premium, and was current when they failed. A guarantee was then, on 6th August, 1878, given by *J. Smith* and *W. E. Weir*, and accepted by the company as a satisfactory security for the premium. This guarantee, addressed to the Secretary of the company, was as follows:

We hereby guarantee you the payment of $210 premium of insurance on schooner *Mabel Clare* and on policy 142, and for which you held the note of *Wier Bros. & Co.*

Wier Bros. & Co. went into insolvency on 7th September, 1878, and the plaintiff was appointed assignee of their estate. The note became due on 30th September, 1878, and was not paid, but remained overdue and unpaid at the date of the loss on the 12th of October, 1878.

Upon this state of facts I should have been of opinion that the plaintiff was not entitled to recover, differing altogether in this respect from the court

below, who place their judgment in favour of the plaintiff entirely upon the ground that the conditions were all complied with. The condition to pay or secure the loss in case of failure in business or insolvency was no doubt sufficiently complied with by giving the guarantee to the satisfaction of the company; but there was a clear breach of the other and distinct condition which provided that, in case the premium or the note or other obligation given for it should not be paid when due, the policy should be void from the date of default. Here the guarantee was an obligation given for the premium, as well as the note, and that was according to the undoubted construction of its terms, to pay according to the tenor of the note, *i.e.*, at its maturity. It seems to me therefore impossible to say that there was not at the date of the loss such a default as rendered the policy void. I cannot therefore place my judgment on the same grounds as those on which that of the Supreme Court of *Nova Scotia* proceeded.

It appears to me, however, that the plaintiff was clearly entitled to recover on the award which was made in pursuance of the arbitration clause already mentioned, by arbitrators duly appointed according to the terms of that provision. By this award it was determined that the company was liable for the loss in the amount for which the judgment of the court was entered. The case states that the declaration contains a count on this award. No objection was made on any ground to the award, which must be taken to have disposed of all matters which were included in the terms of the arbitration clause already set out. That clause is beyond all question sufficiently comprehensive to include all disputes relative to the payment or securing of the premium according to the terms of the policy. By it arbitration was made a condition precedent to any

1882

ANCHOR MARINE INS. CO. v. CORBETT.

Strong, J.

action being maintained on the policy, or in respect of the insurance.

Whether the case of *Scott* v. *Avery* (1) is to be considered as determining that such a condition precedent is valid as regards all questions, those of liability as well as of amount of damage, or whether it is only binding as to the amount of debt or damage, and is illegal as tending to oust the jurisdiction of the courts when it goes to the root of the action, as was held by *Kelly*, C.B., and *Brett*, J., in *Edwards* v. *The Aberayron Mutual Ship Ins. Society* (2), is a question which does not arise in the present case. Here no objection has been raised to the arbitration clause, but the parties have mutually acted under it. Therefore, it not being suggested that any fault can be found with the award, and the question as to the payment or default in payment of the premium being "a difference relating to the insurance" within the meaning of the policy; and the award not appearing on its face to be bad from any mistake of law or otherwise, we must hold it binding on the company. It, therefore, entirely precludes us from the consideration of the condition relating to the payment of premium and the question of default under it. The appeal must consequently be dismissed with costs.

FOURNIER, J. :—

L'Appelante poursuivie sur une police d'assurance maritime émise par elle en faveur de *Weir Bros. & Co.*, a été condamnée à payer à l'Intimé *Corbett*, comme syndic à la faillite de ces derniers, la somme de $6,399.41. D'après les conditions de la police la prime pouvait être acquittée par un billet promissoire, mais à la condition que si le billet n'était pas payé à son échéance la police devenait nulle. Dans le cas d'insolvabilité des assurés,

(1) 5 H. L. C. 811. (2) 1 Q. B. D. 563.

1882

ANCHOR MARINE INS. CO. v. CORBETT.

Fournier, J.

avant l'échéance du billet, l'assurance devenait aussi nulle, à moins que la prime ne fût payée ou garantie d'une manière satisfaisante. Conformément à cette dernière condition, (les assurés étant tombés en faillite), une garantie pour le paiement de la prime fut offerte à la Cie. et acceptée par elle. Le billet ainsi garanti ne fut pas payé à son échéance. L'appelante invoque ce défaut de paiement comme étant, en vertu des conditions de la police une cause de nullité, et demande pour ces motifs l'infirmation du jugement rendu contre elle. Cette prétention n'est pas justifiée par les termes de la police. La condition de nullité est établie pour deux cas : le premier, défaut de paiement du billet de prime à son échéance ; le deuxième, dans le cas d'insolvabilité de l'assuré avant l'échéance. Cette dernière cause de nullité peut être évitée en donnant une garantie. Dans le cas actuel une garantie a été donnée et acceptée. La police ne contient aucune condition de nullité pour le cas où la garantie n'est pas payée à l'échéance. La raison en est sans doute que la Cie. ayant, dans ce cas, le choix entre le paiement et la garantie, si elle accepte cette dernière c'est qu'elle la considère comme parfaitement équivalente à un paiement. De plus il n'appert pas dans la cause que la Cie. ait fait aucune démarche pour se faire payer de cette garantie, ni que le paiement en ait été refusé. Cette raison suffirait seule pour faire renvoyer l'appel. Mais il y a pour cela une autre raison encore plus concluante : C'est que la Cie. ayant volontairement procédé avec l'Intimé à un arbitrage des matières en contestation concernant cette police, il ne lui est plus permis d'opposer le défaut de paiement comme moyen de défense. La sentence rendue par les arbitres est finale et ne peut pas être revisée dans cette cause. Elle n'aurait pu l'être qu'en se conformant aux dispositions de la loi à cet égard, c'est-à-dire en faisant de la référence aux arbitres

1882

ANCHOR MARINE INS. CO. v. CORBETT.

Fournier, J.

une règle de cour et en faisant motion pour la faire annuler pour quelques-unes des causes admises par la loi. Ceci n'ayant pas été fait, la sentence doit être considérée comme ayant terminé la contestation, et l'appel doit être renvoyé avec dépens.

HENRY, J.:

This action was brought on a policy of Marine Insurance and upon an award in favor of the respondent. A special case was substituted for the usual pleadings and the evidence adduced before the arbitrators was made evidence herein.

I am of opinion the respondent is entitled to our judgment on both counts.

The only objection to the recovery by the respondent on the first is, that before the note became due the insured became bankrupt, and the note at maturity was protested for non-payment, and that at the time of the loss it still remained unpaid. By one provision of the policy, if the premium or any part thereof should be unpaid when due, the policy was to become void from that time, but that the insured should be entitled to recover if the loss occurred before such default. By another clause of the policy it was provided that if the person or persons liable to the company for the premium, or on any note or obligation therefor, or any part thereof, should become bankrupt or insolvent before the time for payment should arrive, the insurance should become and be void, unless and until before loss the premium should be paid or satisfactorily secured to the company.

The policy was issued on the 27th of June, 1878. The note, dated the same day, for the premium ($210) was payable three months after date, and fell due on the 30th September following.

Having become bankrupt, *Wier Bros & Co.*, having

been called upon for security, obtained, and the company, by their agent, accepted, a guarantee on the 6th of August following. It was addressed to the secretary of the company, and is as follows:

DEAR SIR,—We hereby guarantee you the payment of $210, premium of insurance on schooner "*Mable Clare*" under policy No. 142, and for which you hold the note of *Wier Bros. & Co.*

The note was protested for non-payment on the 30th September, and the loss occurred on the 12th of October. We see here two provisions, under the first of which, if not for the other, the policy became void for non-payment of the premium on the 30th of September as to any loss subsequent to that date. Under the second, provision is made against the loss to the company through the bankruptcy of those whose note was taken for the premium, and in that event the policy is to become void "unless and until before loss the premium be paid or satisfactorily secured to the company." There is therefore this important distinction, that under the first provision actual payment is necessary to keep alive the policy, but in the the other, satisfactory security is put on the same footing as payment. In this case, therefore, the policy did not become wholly void, but the security under it suspended until at any time before loss it was satisfactorily secured. I think the true construction of the two clauses, each making provision for different events, are not to be read together, and that by considering the second alone, the giving the security is shown to be equivalent to payment. The policy was binding on the company if the premium were paid before loss, and I think it was equally binding if it were satisfactorily secured as admitted to have been done.

After the loss the whole subject was submitted to three arbitrators, chosen by the parties, and the award made as provided for in the policy. It was not set

1882

ANCHOR MARINE INS. CO. v. CORBETT.

Henry, J.

aside, nor were any steps taken to set it aside. It is not attacked for any reason given or alleged. By the reference, all matters of fact and law were submitted unreservedly to the arbitrators, and unless some good reason to set it aside, such as the refusal of the arbitrators to admit important and legitimate evidence or other improper conduct on their part, no court would interfere with it. The submission was the voluntary act of the parties who, by it, made the arbitrators judges of the law and as a jury to decide on the evidence. The award in this case would be binding on the parties, even if no provision had been made for the submission by the policy, and it is none the less so because the submission is so provided for.

I think the judgment of the court below is right, and that it should be affirmed with costs.

TASCHEREAU, J., was also of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellants: *J. N. & T. Ritchie.*

Solicitors for respondent: *Meagher, Chisholm & Ritchie.*