

1927

*Oct. 10, 12.
*Oct. 13.

THOMAS D. BULGER (PLAINTIFF).....APPELLANT;

AND

THE HOME INSURANCE COMPANY }
(DEFENDANT) } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH
COLUMBIA (1)

Insurance, fire—Arbitration—Fire Insurance Policy Act, s. 22—Arbitration Act, s. 8—Defendant's right to appointment of arbitrator—Stay of action pending arbitration—Waste of time and money in trivial technical disputes.

In an action on a fire insurance policy on household furniture, the appellant claimed damages for the respondent's failure to repair or replace the goods as the plaintiff alleged the insurance company had elected to do; and in the alternative, indemnity for loss of, or damage to, the goods insured. The insurance company having given notice of the appointment of an arbitrator under statutory condition no. 2, and the appellant having refused to appoint an arbitrator, the respondent applied for an order directing such an appointment, and also for an order for a stay of proceedings pending the arbitration. Both applications were dismissed by the trial judge; and the Court of Appeal allowed both appeals.

Held, that if in fact there had been an election by the respondent to take advantage of the re-instatement clause, the appellant was entitled to enforce the obligation to re-instate, and in respect of the appellant's claim for damages for failure to do so, the arbitration clause would have no operation, and the respondent would not be entitled either to an order directing the appointment of an arbitrator or to a stay. It

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

(1) See [1927] S.C.R. 451.

was ordered that the issue of election or no election should be determined, and on the determination of that issue, further proceedings should take place, as stated in the judgment now reported. Observations upon waste of time and money in trivial and technical disputes, especially where the amount involved are insignificant.

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APPEAL from the judgment of the Court of Appeal for British Columbia (1) reversing the judgment of Hunter C.J. and granting an order appointing an arbitrator and another order staying all proceeding in an action on a fire insurance policy pending the arbitration.

L. G. McPhillips K.C. for the appellant.

C. W. Craig K.C. for the respondent.

At the conclusion of argument by counsel, the judgment of the court was orally delivered by

DUFF J.—If, as the appellant alleges, the respondent company did elect to take advantage of the re-instatement clause in the policy, then, the appellant, having asserted his right to enforce the company's obligation to re-instate, would have no right to indemnity, pursuant to the proofs of loss; and the arbitration clause would never come into play.

The company therefore was not entitled to a stay of proceedings under the *Arbitration Act* until it had been determined that there had been no election.

If, on the contrary, there was no election, there was no reason for refusing the application of the respondent for an order for the appointment of an arbitrator or a stay of proceedings.

Therefore the judgment of the Court of Appeal, as well as the orders made on the respondent company's two applications, should be set aside.

The dispute as to the alleged election could be decided on the hearing of the company's application for a stay, if both parties should so desire; but if they do not agree upon that course, then upon delivery of the statement of defence, an issue should be directed to determine that dispute. If the issue be decided in favour of the appellant, the action should proceed for the disposition of the claim for dam-

(1) [1927] 2 W.W.R. 456.

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ages; and, if otherwise, further proceedings in the action should be stayed, and the arbitration proceeded with.

Meantime, the applications for a stay and for the appointment of an arbitrator should be kept on foot.

The appellant should have the costs of the present appeal and the respondent those of the appeal to the Court of Appeal.

The costs already incurred are quite disproportionate to the importance of the matters in dispute, and it is hoped that all parties will concur in a serious effort to avoid waste of time and energy in barren quarrels about questions of practice, and to have the questions of substance disposed of as speedily and inexpensively as possible.

Appeal allowed with costs.

Solicitors for the appellant: *McPhillips & Duncan.*

Solicitors for the respondent: *Walsh, McKim, Housser & Molson.*
