1927

*May 3.
*May 30.

IN THE MATTER OF THE "FIRE INSURANCE POLICY ACT," BEING R.S.B.C. 1924, CHAP. 122 AND AMENDMENTS;

AND

IN THE MATTER OF THE "ARBITRATION ACT," BEING R.S.B.C., CHAP. 13 AND AMENDMENTS;

AND

IN THE MATTER OF A CERTAIN CLAIM BY THOMAS D. BULGER AGAINST THE HOME INSURANCE COMPANY UNDER POLICY OF FIRE INSURANCE No. 5605

BETWEEN

THOMAS D. BULGER .....APPELLANT;

AND

THE HOME INSURANCE COMPANY...RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Appeal—Jurisdiction—Final Judgment—Amount in Controversy—Supreme Court Act, ss. 2 (e), 36, 39 (a).

The insured under a fire insurance policy, alleging that the insurer had elected, under a provision in the policy, to reinstate the property destroyed instead of paying money compensation, sued the insurer for $2,255 damages for failure to reinstate, and, alternatively, claimed the same sum as money compensation. The insurer, denying that it had elected to reinstate, and insisting that the insured's only right was to recover money compensation, applied for the appointment, pursuant to the British Columbia *Fire Insurance Policy Act* and *Arbitration Act*, of an arbitrator, by reason of the insured's failure to appoint one. Hunter C.J. B.C. dismissed the application, but his order was set aside by the Court of Appeal ([1927] 2 W.W.R. 456) which directed a reference to appoint an arbitrator and, by a separate order, stayed the insured's action. The insured appealed to the Supreme Court of Canada, and the insurer moved to quash the appeal for want of jurisdiction.

Held, the judgment of the Court of Appeal was a final judgment within s. 2 (*e*) of the *Supreme Court Act;* it impliedly negatived the existence of the insurer's obligation to effect a reinstatement and the insured's right to recover damages for its alleged failure to discharge its obligation in this regard; while the judgment stood, those issues

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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were conclusively determined against the insured; it determined a substantive right of the insured in controversy in a judicial proceeding. Moreover, it was a direct, and not a merely collateral and consequential, effect of the judgment that the insured's right to sue for and recover damages alleged to exceed $2,000 was denied. The Court had, under ss. 36 and 39 (*a*) of the *Supreme Court Act*, jurisdiction to entertain the appeal. The case was within the principle of *Shawinigan Hydro Electric Co.* v. *Shawinigan Water & Power Co.*, 43 Can. S.C.R. 650.

MOTION to quash appeal to this Court for want of jurisdiction. The grounds of the motion and the facts bearing on the question to be decided on the motion are sufficiently stated in the judgment now reported. The oral reasons delivered for the judgment from which the appeal was taken are reported in [1927] 2 W.W.R. 456.

H. A. Aylen for the motion.

E. P. Davis K.C. contra.

The judgment of the court was delivered by

ANGLIN C.J.C.—The respondent moves to quash this appeal for want of jurisdiction on the grounds that the judgment against which it is sought to appeal is not a final judgment and that the amount or value of the matter in controversy in the appeal does not exceed the sum of $2,000.

The respondent company had insured the appellant against loss by fire. Such loss occurred and the liability therefor of the respondent is not in issue, only the amount of indemnity being contested. The policy contained the usual provision entitling the respondent to reinstate property injured or destroyed instead of making good the insured's loss by money compensation. This option, the appellant maintains, the company elected to exercise, and he brought action against it, alleging failure on its part to discharge the obligation thus undertaken and claiming $2,255 damages for such breach of contractural obligation and, alternatively, the same sum as money compensation for the loss sustained as a result of the fire. The respondent, denying that it had elected to reinstate the property and insisting that the appellant's only right was to recover money compensation for his loss, proceeded by originating summons before the Chief Justice of British Columbia in

Chambers for the appointment, pursuant to the *Fire Insurance Policy Act* and the *Arbitration Act*, of an arbitrator by reason of the failure of the appellant to appoint an arbitrator pursuant to written notice in that behalf.

The learned Chief Justice, upholding the contention of the appellant, the insured, dismissed the motion.

The Court of Appeal set aside the order of the Chief Justice and directed a reference to a judge of the Supreme Court of British Columbia in Chambers to appoint an arbitrator as sought by the respondent company and, by a separate order, stayed the plaintiff's action pending the arbitration.

This judgment impliedly negatived the existence of the obligation of the company to effect reinstatement as claimed by the appellant and his right to recover damages for the alleged failure of the company to discharge its obligation in this regard. While it stands those issues are conclusively determined against the appellant. The judgment appealed from is, therefore, in our opinion, a final judgment within the definition of the *Supreme Court Act* (s. 2 (*e*)) inasmuch at it determines a substantive right of the appellant in controversy in what is, beyond doubt, a judicial proceeding.

Moreover, it is a direct, and not a merely collateral and consequential, effect of that judgment that the appellant's right to sue for and recover damages alleged to exceed $2,000 is denied.

As the value or amount of the matter directly in controversy in this appeal from a final judgment of the highest court of final resort in the province of British Columbia exceeds the sum of $2,000, it follows that this Court has jurisdiction to entertain this appeal. Sections 36 and 39 (*a*) of the *Supreme Court Act*. The case is within the principle of the decision in *Shawinigan Hydro Electric Co.* v. *Shawinigan Water & Power Co.* (1).

The motion to quash will accordingly be dismissed with costs.

Motion dismissed with costs.

Solicitors for the appellant: *McPhillips & Duncan.*

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

(1) (1910), 43 Can. S.C.R., 650.