

the five heads, and the appeal should be allowed, with the order as to costs which has been proposed.

Their Lordships allowed the appeal.

Counsel for the Appellants—Sir R. Finlay, K.C.—W. Ryde, K.C.—A. M. Latter. Agents—Godden, Holme, & Ward, Solicitors.

Counsel for the Respondent—Sir J. Simon (A.-G.)—Sir S. Buckmaster (S.-G.)—W. Finlay, K.C. Agent—H. Bertram Cox, Solicitor of Inland Revenue.

HOUSE OF LORDS.

Tuesday, December 15, 1914.

(Before the Lord Chancellor (Viscount Haldane), Lords Dunedin, Atkinson, Parker, and Parmoor.)

JUREIDINI v. NATIONAL BRITISH AND IRISH MILLERS' INSURANCE COMPANY, LIMITED.

Contract—Insurance—Fire Policy—Reputation of Liability—Arbitration Clause—Approbate and Reprobate.

An insurance company repudiating liability under a contract of insurance on the ground of fraud cannot claim that action is barred by the non-fulfilment of a condition precedent to the contract.

Decision of Court of Appeal reversed.

Scott v. Avery (1856, 5 H.L. Cas. 811) considered and distinguished.

Appeal from a decision of the Court of Appeal setting aside a judgment of DARLING, J., and the verdict of a special jury by which judgment was entered for the appellants for the sum of £543, 2s. upon two policies of assurance issued by the respondent company.

The appellant and his partner Mitri Mahli, his co-plaintiff in the action (since deceased), carried on the business of merchants and wholesale dealers in textiles, hardware, and other merchandise at premises situate at Lot 2, Manzana, 29 Second Street, Port Limon, in the Republic of Costa Rica, under the style of "N. & N. Jureidini & Company." The defendants were the Insurance Company, whose head office is at No. 59 Mark Lane, London, E.C.

The appellant firm had insured their stock-in-trade upon the premises at Port Limon against loss or damage by fire under two policies issued by the respondent company. The insurances were effected, together with seven other policies in all, for a total amount of £5800, on the same stock by Nasil Jureidini of Manchester through J. Horkeimer, a broker of Manchester. This broker instructed Price, Forbes, & Company, the agents of the respondents, to whom all premiums due upon the policies were paid. The policies were all in force at the time of the fire hereinafter referred to, and all were substantially in the same form. There was also another policy for £1000 on adjoining

premises occupied by C. S. Lazarus, but no claim was made by the appellant firm under that policy to which the present proceedings had reference.

The policies contained, *inter alia*, the following conditions:—" (10) On the happening of any loss or damage the insured must forthwith give notice in writing thereof to the company, and must within fifteen days after the loss or damage or such further time as the company may in writing allow in that behalf dispatch to the company a claim in writing for the loss and damage, containing as particular an account as is reasonably practicable of all the articles or items of property damaged or destroyed, and of the amount of loss or damage thereto respectively, and of any other insurances, and must at all times, at his own expense, produce and give to the company all such books, vouchers, and other evidence as may be reasonably required by or on behalf of the company, together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith, and if the insurance is subject to average the insured must within the aforesaid fifteen days, or such further time as the company may in writing allow in that behalf, dispatch to the company an account of all the property insured with the estimated value thereof at the breaking out of the fire. No amount shall be payable under this policy unless the terms of this condition have been complied with. (12) If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this policy, or if the loss or damage be occasioned by the wilful act or with the connivance of the insured, or if the insured or anyone acting on his behalf shall hinder or obstruct the company in doing any of the acts referred to in condition 11; or if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of condition 17 of this policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this policy shall be forfeited. (17) If any difference arises as to the amount of any loss or damage, such difference shall independently of all other questions be referred to the decision of an arbitrator to be appointed in writing by the parties in difference, or if they cannot agree upon a single arbitrator, to the decision of two disinterested persons as arbitrators, of whom one shall be appointed in writing by each of the parties within two calendar months after having been required to do so in writing by the other party. In case either party shall refuse or fail to appoint an arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint a sole arbitrator; and in case of disagreement between the arbitrators the difference shall be referred to the decision of an umpire who shall have been appointed by them in writ-

ing before entering on the reference, and who shall sit with the arbitrators and preside at their meetings. The death of any party shall not revoke or affect the authority or powers of the arbitrator, arbitrators, or umpire respectively; and in the event of the death of an arbitrator or umpire another shall in each case be appointed in his stead by the party or arbitrators, as the case may be, by whom the arbitrator or umpire so dying was appointed. The cost of the reference and the award shall be in the discretion of the arbitrator, arbitrators, or umpire making the award; and it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators, or umpire of the amount of the loss or damage if disputed shall be first obtained."

On the 20th April 1910 all the appellants' premises and all the goods stored there were totally destroyed by a fire, which also partially destroyed the books of the firm.

Notice of the fire and loss was immediately given by cable to the firm's agent in Manchester, who in turn communicated the fact by letter, dated the 25th April 1910, to the respondents and to the other insurance offices.

By letter dated the 27th April 1910 Price, Forbes, & Company informed J. Horkeimer that the respondents were acting as "leading office" in connection with the loss, and had instructed Lloyd's agent at Costa Rica to protect their interest and to settle the claim together with the British Consul, and that the other companies interested would follow this settlement. The claimants valued their goods at £6000.

A long correspondence passed between the agent of the appellants in Manchester and Price, Forbes, & Company with a view of settling the claim and proving the amount of loss, but ultimately the respondents wrote on the 28th October to Horkeimer saying that their solicitors advised them to take no steps as they had no claim before them, and that they were writing Lloyd's agent to do nothing without specific instructions from them. They added—"The circumstances of the case are so suspicious that our feeling is that we should reject any claim *in toto*."

Further correspondence followed, which resulted in the respondents' solicitors definitely rejecting the claim on the ground of arson, and informing the claimants that they represented all the insurance companies concerned.

The claimants then commenced actions against the several companies, but the action against the respondents was alone allowed to proceed.

By their amended defence the respondents, while denying the alleged loss and that any sum was payable to the appellant firm in respect thereof, pleaded fraud and arson as an answer to the claim, and further, that no arbitration had been had and no award made of loss and damage as provided in condition 17 of the said policy, and that it was a condition precedent to any right of action or suit upon the policy that the award of the arbitrator, arbitrators, or umpire, as

the case might be, of the amount of the loss or damage if disputed should be first obtained.

By their reply the appellants alleged that the respondents had never disputed the amount of the loss, and that condition 17 of the said policies did not apply; that by condition 12, the claim having been totally rejected, the appellant firm were entitled to bring an action, and that the respondents had agreed to abide the result of such action.

At the trial before DARLING, J., and a special jury, seven questions were left to the jury, which with their answers were as follows—" (1) Did the plaintiffs set fire to their premises or connive at their being set on fire?—No. (2) Did the plaintiffs make a fraudulent claim within clause 12?—No. (3) Were Price, Forbes, & Company agents for the plaintiffs or for the defendants for the purpose of issuing the policy sued on?—For the defendants. (4) Did the defendants by their conduct waive compliance with condition 3?—Yes. (5) Did the plaintiffs dispatch a claim in writing within fifteen days to comply with condition 10?—A reasonable intimation was given. (6) Did the defendants by their conduct waive compliance with condition 10?—Yes. (7) What was the value of the goods destroyed?—£3000."

At the close of the plaintiffs' case, and again after the jury had delivered their verdict, counsel for the respondents submitted that the plaintiffs had made out no case as there had been no arbitration under clause 17 of the policies, and counsel for the plaintiffs submitted that there had been a total rejection under clause 12, and that the defendants by their conduct had waived condition 17.

DARLING, J., entered judgment for the plaintiffs for the sum of £543, 2s. upon the two policies effected with the defendants.

The Court of Appeal (VAUGHAN WILLIAMS, FARWELL, and KENNEDY, L.JJ.) set the judgment aside on the ground that no action was maintainable until there had been an arbitration to assess the amount of the damage.

The plaintiffs appealed.

Their Lordships' judgment was delivered by

LORD CHANCELLOR (HALDANE)—I believe your Lordships are unanimously of opinion that this case ought to be disposed of upon the preliminary point.

Shortly described, the nature of the case was this. The appellants, who were plaintiffs in the action in the Court below, took out various policies of insurance with insurance companies, of whom the respondents were one, and it has been agreed that as these policies were substantially in the same form, the present action should be taken as a test action and should dispose of them. The insurance was over property at Costa Rica, and the form of the policy was a policy over stock of textiles and hardware and other non-hazardous merchandise, the property of the insured on the premises of a certain store at a

certain place in Port Limon, in Costa Rica, and the insurance under the particular policy sued on, the policy which was taken as the test case, was for £800. Then there were certain conditions, and two of them were of importance. Condition 12 I will read. It is in these terms—"If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this policy, or if the loss or damage be occasioned by the wilful act or with the connivance of the insured"—I need not read certain further conditions which follow, but the consequence at the end of this clause is that all benefit under this policy shall be forfeited in the cases I have described and in the other cases. Then clause 17 of the policy says that if any difference arises as to the amount of loss or damage, the difference is to be submitted to arbitration, and it is "expressly stipulated and declared that it shall be a condition-precident to any right of action or suit upon this policy that the award by such arbitrator, arbitrators, or umpire of the amount of the loss or damage if disputed shall be first obtained."

What happened was this. There was a loss occasioned by fire at Port Limon and the appellants made a claim under the policy, and the respondents took up the ground that the loss was caused by the felonious acts of the appellants. They charged arson, and they said that the claim was a fraudulent claim. That was obviously a case which if made out went to the very root of the matter, because clause 12 of the policy which I have read says that if the claim be a fraudulent one and damage be occasioned by any wilful act, then all benefit under the policy is to be forfeited, and that attitude was again taken up by the respondents, because when the action was brought by the appellants on which this appeal arises, the respondents in their defence took this ground, they maintained that the appellants were not entitled to claim under the policy.

No doubt it is true that the policy contained an arbitration clause with a very stringent addition to it to the effect that the going to arbitration is a condition-precident to the right to sue; and if that had been all, and if an action had been brought upon a policy containing such a clause and no more had happened, then on principle and on authority the claim could not have been maintained without fulfilling the condition-precident, because by the law of this country you can make most contracts which you desire, and among others a contract that you will not come under liability under a contract unless that liability is defined in a particular way, if necessary by an arbitrator, and *Scott v. Avery* (1855, 5 H.L. Cas. 811) is a decision of this House to the effect that that is the law. But in *Scott v. Avery* the action was brought upon a contract containing such a clause, and to the declaration a plea was put in raising this term of the contract, that the action could not be maintained because the plain-

tiff had contracted he should have no cause of action unless there had been a previous arbitration, and that the plea was demurred to, and this House ultimately decided, after consulting the Judges, who differed very much in opinion (the decision was a final decision), that the demurrer was not a good demurrer, that the plea was a good one, and that the action could not be maintained. That was in effect a decision upon a demurrer. But the present case, as I have already pointed out, is different. There has been in the proceeding throughout a repudiation on the part of the defendants of liability based upon charges of fraud and arson, the effect of which is that the right to all benefit under the policy is forfeited, but one of the benefits is the right to go to arbitration under this contract and to establish your claim in the way which may to some people seem preferable to proceedings in the courts, and accordingly that is one of the things which the appellants have, according to the respondents, forfeited with every other benefit under the contract. Speaking for myself, when there is repudiation which goes to the substance of the whole contract, I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced. As I have said, this is not a case like *Scott v. Avery*. It is a case in which the consequences with which we are dealing arise from the fact of the repudiation. When the case went to trial it was heard before Darling, J., and a special jury, and the jury found that the case of fraud and arson had broken down and found for the plaintiffs upon those issues, and the learned Judge gave judgment, not that the case should go to arbitration, but for £3000, and I think that that was probably right, the arbitration clause having gone with the repudiation. The respondents appealed to the Court of Appeal on two grounds—first, that the arbitration clause was a bar to the action; and secondly, for a new trial on the ground that the verdict was against the weight of evidence, and also on the ground there was further evidence which ought to be taken into account. The second ground was sought to be made good on a notice of motion which I gather was out of time, but which under the special circumstances it was hoped the Court of Appeal would none the less give leave to entertain.

The Court of Appeal has never disposed of the motion for a new trial on either of the grounds which I have indicated. It has only disposed of the case on the footing that the arbitration clause is a bar—a conclusion which for the reasons I have already indicated I am unable to concur in. I am therefore of opinion that the judgment of the Court below, the Court of Appeal, must be reversed, and that this case should go back to be disposed of by the Court of Appeal on the motion for a new trial, and I think that the most convenient form in which to put our judgment will be this—To restore the judgment of Darling, J., without prejudice to any application that the respondents may make to the Court of

Appeal with a view to restoring and disposing of the notice of appeal which relates to the new trial, and that the judgment of Darling, J., should be stayed for a month with a view to such application.

I am of opinion also that the respondents should pay the costs here and I think in the Court of Appeal also, and I move your Lordships accordingly.

LORD DUNEDIN—I concur. I certainly have not got the slightest idea that in pronouncing the judgment we are about to give we are in the faintest way throwing any doubt upon the decision of this House in the case of *Scott v. Avery*. That decision in the case of *Scott v. Avery* was again upheld by the House, in a more recent case of *Caledonian Insurance Company v. Gilmour*, 1893 A.C. 85, at p. 90, where the Lord Chancellor (Lord Herschell) put the matter in a single sentence when he said—"The question is where the only obligation created is to pay a sum ascertained in a particular manner—where, in other words, such ascertainment is made a condition-precident to the obligation to pay, the courts can enforce the obligation without reference to such ascertainment." Personally I should rather like to reserve my opinion as to what would have been the effect if the parties in this case, instead of pleading as they did, had pleaded in this way—"We will allow this question to be disposed of at law by a jury as to whether there was fraud and arson or not," and had gone on to say—"But in the event of that being negatived we wish this ascertainment of actual damage to be ascertained by arbitration." I should like to reserve my opinion on whether they might not have said so with effect.

The very clear argument of Mr Matthews tried to make out that if he once showed that at a certain time in Costa Rica a certain difference had arisen, then that brought into full operation the effect of the condition-precident in clause 17 as being applicable to all suits. I do not think that that view can be maintained, because clause 17 provides for the case of a difference arising as to the amount of loss, and then says—"It shall be a condition-precident to any right of action or suit upon this policy that the award of such arbitrator," and soon, "of the amount of the loss or damage if disputed shall be first obtained." I think it is perfectly clear that that clause necessarily refers to an existing difference, not a historical difference, and it seems to me that when the attitude was taken up by these parties which was taken up in the letters that have been read to me, which the learned Lord Chancellor has referred to, in England, that they repudiated the claim altogether and said there was no liability under the policy whatsoever, that necessarily cut out the effect of clause 17 as creating a condition-precident against all forms of action. I therefore concur in the motion which has been made by the noble and learned Lord on the Woolsack.

LORD ATKINSON—I concur on this short ground. I think that clause 17 refers to

existing disputes and differences about the amount of loss claimed, and in a contract on indemnity such as this is I do not think that clause has any application whatever when the person to indemnify says—"You yourself brought about the destruction of the goods that were insured for an indemnity for which you claim," and insists upon a clause which provides that in that state of circumstances all benefit under the policy is forfeited. I therefore think that the order should be made which has been suggested by my noble friend on the Woolsack.

LORD PARKER—I agree.

LORD PARMOOR—I concur. The respondents raised an issue on which, if they had succeeded, the appellants would have forfeited all benefit under the policy. This, in my opinion, would have included that benefit that would have been forfeited under clause 17 of the contract, the policy. At the same time I should like to express my own opinion that no difference would have arisen as regards matters that could have come under clause 17, and therefore the clause did not in any case apply.

Appeal allowed.

Counsel for the Appellant—G. Hewart, K.C.—S. Mayer, K.C.—D. O. Evans. Agents—Fielder, Jones, & Harrison, for C. T. Rhodes & Son, Halifax, Solicitors.

Counsel for the Respondents—J. B. Matthews, K.C.—Holman—Gregory, K.C.—P. B. Durnford. Agents—Andrews, Ogilvie, & Fisher, Solicitors.

HOUSE OF LORDS.

Monday, February 1, 1915.

(Before Earl Loreburn, Lords Atkinson, Parker, Sumner, and Parmoor.)

MAISEL *v.* FINANCIAL TIMES,
LIMITED.

(ON APPEAL FROM THE COURT OF APPEAL
IN ENGLAND.)

Reparation—Slander—Veritas—Innuendo—Proof of General Character.

The appellant complained of certain words as bearing the innuendo that he was of dishonest character. The respondents referred to a series of acts by the appellant, which they alleged proved his dishonesty. The appellant claimed to have these allegations struck out of the pleadings as irrelevant.

Held that as the appellant maintained that the statements complained of meant that he was a dishonest person, the respondents were entitled to prove him to be so in justification of their statements.

Their Lordships' judgment was delivered by

EARL LOREBURN—It is not necessary to call upon counsel for the respondents in this case, because, in my opinion, the order