SUMMER SESSION, 1924.

COURT OF SESSION.

Wednesday, May 14, 1924.

FIRST DIVISION.

[Lord Blackburn, Ordinary.

WOODS *v.* CO-OPERATIVE INSURANCE SOCIETY, LIMITED.

Arbitration — Insurance Policy — Arbitration Clause — Applicability — Differences Arising out of Policy — Whether Property Covered by other Insurance.

Insurance — Fire Insurance Policy — Arbitration Clause — Applicability — Dispute as to whether Insured Covered by Separate Policy Issued by Third Party.

The conditions of a policy of insurance against fire restricted the liability of the insurance company to a rateable proportion of the loss if at the time of a loss the property affected was covered by any other insurance, and provided that all differences arising out of the policy were to be referred to arbitration. In an action on the policy for loss the company contended that the property was covered by an insurance effected through a newspaper under what was advertised as a "free insurance scheme," and that this was a question which fell to be decided by arbitration under the conditions of the policy. In a document issued with the newspaper containing the conditions of the scheme to which the advertisement referred it was stated that the scheme did not involve any contractual liability. *Held* that as it was clear from the terms of the document that there was no insurance effected under the scheme, there was no difference to refer under the arbitration clause, and that as the amount of the loss was not in dispute, the pursuer was entitled to decree.

Thomas Woods, Tranent, *pursuer*, brought an action against the Co-operative Insurance Society, Limited, Edinburgh, *defenders*, for payment of £137, 10s., being the amount of the loss as fixed by an assessor selected by the defenders sustained by him owing to his furniture, which was insured with the defenders, having been damaged by fire.

The policy of insurance contained, *inter alia*, the following conditions:—"9. If at the time of the loss or damage there be any other insurance effected by the insured or by any other person covering the property affected by the fire, (*a*) this Society shall not be liable to pay more than their rateable proportion of the loss or damage. 10. All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed by the parties in difference, . . . and unless and until an award has been made the Society shall not be liable for any loss or damage, and such award shall be a condition-precedent to any liability of the Society, or of any right of action against the Society in respect of such claim."

The defenders had tendered the pursuer the sum of £44, 7s. 6d. in full of his claim, and they contended that this sum was the rateable proportion of the loss for which they were liable. They averred that "At the date of the loss in question the pursuer was insured with Messrs Odham's Press, Limited, the proprietors of the newspaper *John Bull*, for the sum of £300 against fire losses. In each copy of this newspaper, which is a weekly one, there are inserted details of a scheme of insurance available to regular subscribers against fire, accident, and sickness, the insurers being the said Odham's Press, Limited. Two forms of coupon are provided in each issue of the said newspaper to be filled in by the intending subscriber, one being a form of order to be returned by him to the newsagent through whom he orders the newspaper, the other being a request for registration as a regular reader, to be sent by the subscriber to *John Bull*, Registration Department, at the office of Odham's Press, Limited. In return the subscriber receives from Odham's Press, Limited, a printed registration certificate detailing the conditions and benefits of the scheme. . . . On 18th January 1923 the pursuer filled up and handed to his newsagent, Mr Simpson, Tranent, the order form No. 370,400A for *John Bull* for thirteen weeks, and on or about the same date he filled in and sent to Odham's Press, Limited, a request for registration, in respect of which he was

entitled to be registered and was registered by the said Odham's Press, Limited, as being entitled to the benefits of the scheme, and he thereafter received from them a certificate of registration. Odham's Press, Limited, provide that re-registration on the expiry of the first period of subscription is not necessary if the subscriber continues in fact to be a subscriber to the paper and to reside at the same address up to the date of the events giving rise to the claim for indemnity. Up to and including the date of the fire the pursuer continued to be a subscriber to the paper, and was resident at the address in respect of which he had been registered. By letter of 3rd August 1923 pursuer informed the defenders' assessor that he had been a reader of *John Bull* for eight years, and had made a claim against Odham's Press, Limited, in respect of the fire loss referred to in this action."

The pursuer admitted that he had given an order for *John Bull*, and sent a request for registration to Odham's Press, Limited, and that he had received a printed document entitled a "free insurance gift certificate of registration," which was blank in name and date, but he denied that he was insured under Odham's Press, Limited, and that the document was a policy of insurance or created any contract under which he could claim any benefit.

The document, which was entitled a "free insurance gift certificate of registration," stated that "we will give" to registered readers of *John Bull* certain benefits in the event, *inter alia*, of loss by fire to the readers' household furniture subject to certain conditions, one of which was in the following terms:—"(*m*) In order to comply with the requirements of the law the proprietors of *John Bull* have to announce that while this free insurance scheme does not involve any contractual liability, it has the financial backing and support of Odham's Press, Limited (the proprietors of *John Bull*), whose issued share capital is over £1,250,000."

The pursuer pleaded, *inter alia*—"1. The pursuer being insured against fire under a policy of insurance issued by the defenders, and having sustained the loss condescended on for which he falls to be indemnified under said policy, decree should be granted as concluded for. 2. The defences being irrelevant should be repelled."

The defenders pleaded, *inter alia*—"1. A difference arising out of the policy sued on having arisen, and an award on such difference under the arbitration clause in the policy being a condition-precedent to the defenders' liability under the policy, or to any right of action thereunder against them, and no such award having been pronounced, the action is excluded by the terms of the said arbitration clause, and should be dismissed."

On 2nd February 1924 the Lord Ordinary (BLACKBURN) repelled the first plea-in-law for the defenders, and continued the case for one month to give the defenders an opportunity to decide whether they would take action against the proprietors of *John Bull*.

Opinion.—"The pursuer holds a policy with the defenders' company under which his household furniture is insured against fire for a sum of £150. On 18th July 1923 a fire occurred by which his household furniture was burned, and it is admitted by the defenders that the loss sustained by him as assessed by an assessor selected by themselves amounted to £137, 10s. In this action the pursuer sues for payment of this sum to indemnify him for his loss.

"In the defences as originally lodged the defenders tendered a sum of £44, 7s. 6d. as the full extent of their liability. They averred that at the date of the fire the pursuer's furniture was also insured with Odham's Press, Limited, the proprietors of the newspaper *John Bull*, for a sum of £300, and they founded on clause 9 of the pursuer's policy with themselves, printed in answer 3, as restricting their liability to the rateable proportion of the loss as covered by the two assurances. This rateable proportion for which the defenders admit liability is stated to be the sum tendered, and is described as 'being one-third of the said loss.' It having been admitted in answer 1 that the said loss amounted to £137, 10s., it is clear that the sum tendered is less than one-third of the total loss by £1, 9s. 2d. This mathematical inaccuracy is a trifling one, but had it been founded on at the discussion as creating a difference between the parties it might have assumed some importance with reference to a plea put upon record by the defenders at adjustment to the effect that the present action is excluded by the arbitration clause in their policy. I desire to make it quite clear that it was never referred to at the discussion, and that the only question argued before me with reference to the defenders' liability was whether or not they were entitled to take credit for the pursuer's alleged right to recover from the proprietors of *John Bull*. I accordingly do not treat this mathematical error as constituting any difference between the parties. Before dealing with the plea founded on the arbitration clause in the policy it is necessary to refer to the parties' averments as to the insurance said to have been effected with *John Bull*. The defenders aver that the newspaper publishes in each copy details of a scheme of insurance against fire available to regular subscribers. That a subscriber only requires to fill in two coupons provided in each issue of the paper and return one coupon to the newsagent from whom he gets the newspaper and the other to the proprietors of the paper requesting that he should be registered as a regular reader. That thereupon the proprietors issue to the subscriber a printed registration certificate and register him as a person entitled to the benefits of the insurance scheme. The defenders aver that the pursuer filled up two coupons as directed and that he received a registration certificate from the proprietors of the paper. They add that he informed their assessor that he had been a reader of *John Bull* for eight years, and had made a claim against the proprietors. In answer to this the pur-

suer admits that he gave an order for the newspaper for thirteen weeks and sent a request for registration to the proprietors, but he avers that he does not know whether he was registered or not. He admits that he received from the proprietors a printed document entitled a 'free insurance-gift certificate of registration' which was blank in name and date and was not stamped, and states that this document was destroyed in the fire. He avers that no contract was created on which he could sue, and that he had not and could not claim any benefits.

"He admits, further, however, that at the date of the fire he made a claim for his loss to *John Bull*, and that his claim was not entertained. The only question argued before me, apart from the question whether the arbitration clause excludes this action, was whether on these averments the pursuer was entitled to a proof before answer.

"I turn now to the arbitration clause—No. 10 of the policy — which so far as material provides—'All differences *arising out of this policy* shall be referred to the decision of an arbitrator, to be appointed by the parties in difference, . . . and unless and until an award has been made the Society shall not be liable for any loss or damage, and such award shall be a condition-precedent to any liability of the Society, or of any right of action against the Society in respect of such claim.' It was argued for the defenders that this clause excludes the present action, and that no action is competent to the pursuer until the difference between them has been adjudicated on by an arbiter. Accordingly, the first question which falls to be decided is whether the difference which has now arisen between the parties is one which 'arises out of this policy' or not. In one sense any dispute between the parties as to the liability of the defenders is a question which arises out of the policy, and it was argued for the defenders that since the difference which has arisen between them is one which relates to their liability under the contract, and does not go to the root of the contract, an arbiter's award is a condition-precedent to the raising of the present action. I was referred to the cases of *Jureidini* ([1915] A.C. 499), *Stebbing* ([1917] 2 K.B. 433), and *Woodall* ([1919] 1 K.B. 593), as establishing that where a difference of any kind arises between two parties to a contract containing an arbitration clause similar to that now under consideration, which could not have arisen but for the contract between the parties, then an award by an arbiter is a necessary precedent to the raising of an action by one party against the other, unless one of them is repudiating the contract on the ground that it is void *ab initio*. In all these three cases the difference between the parties concerned themselves only and raised questions as to the construction of the policy or the carrying out of its terms. In the present action no question arises as to the construction of the policy, and in particular no question arises as to how the terms of clause 9 of the policy are to be given effect to. The only difference between the parties is whether or not the pursuer has entered into a contract with a third party which can be enforced against that party so as to diminish the liability of the defenders under their contract with the pursuer. This difference is not, in my opinion, a difference which arises out of the policy between the pursuer and defenders, but one that arises out of another contract of assurance altogether. The question whether or not the pursuer is entitled to any benefit from the proprietors of *John Bull* is not a question which could be decided finally in any proceeding to which the proprietors of *John Bull* were not parties. An arbiter appointed under the policy between the parties to this action would have no power to convene the proprietors of *John Bull* to the arbitration, and even if he had power to do so, no decision he pronounced would be final as between the parties to this action unless the proprietors of *John Bull* and the pursuer in this action were to accept his decision as final between themselves. The difference between the parties in this case is so different in character to the differences which were under consideration in the cases referred to that I do not think the decisions in those cases have any direct bearing on the present case. I am of opinion that the difference which is the subject of this action is not one which arises out of the contract between the parties, and that it is not one to which the arbitration clause can, on a sound construction of the clause, be held to apply.

"Having reached the conclusion that the action is not excluded by the arbitration clause, I have now to deal with the pursuer's motion which, as I have stated, was for a proof before answer. To grant this motion would not appear to me to lead to any satisfactory conclusion, for the same reasons which I have just given, namely, that the right of the pursuer to recover against the proprietors of *John Bull* could not be finally determined in this action to which the proprietors are not parties, and that until those rights are finally determined the ultimate liability of the defenders cannot be ascertained. A very different result might be reached on the evidence available to the parties in this action to that which might be reached in an action in which the proprietors of *John Bull* were the defenders. This leads to the consideration whether a defence is relevant which is founded on an alleged contract between the pursuer and a third party, and which contains no averment that the pursuer has received any benefit under the contract, and no denial that his claim under that contract has been rejected. In my opinion it is not, and but for the special terms of clause 9 of the policy, to which I shall refer immediately, I should have repelled the defences as irrelevant and granted decree for the sum sued for at this stage, for the following reasons. Fire insurance is a contract of indemnity and of indemnity only, and means that the assured in a case of loss against which the policy has been made shall be fully indemnified, but shall never be more than fully indemni-

fied—per L.J. Brett in *Castellain* v. *Preston*, 1883, 11 Q.B.D. 386. It is for this fundamental principle of insurance that the doctrine of subrogation is applied in all questions between the insurer and the assured for the purpose of preventing the assured from obtaining more than a full indemnity for his loss. The same learned Judge says in *Darrell* v. *Tibbetts* (1880, 5 Q.B.D. 563)—'The doctrine is well established that where something is assured against loss either in a marine or fire policy, after the assured has been paid by the insurers for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject-matter insured, and with regard to every contract which touches the subject-matter insured, and which contract is affected by the loss or the safety of the subject-matter insured by reason of the peril insured against.' Again, in the case of *Simpson* v. *Thomson* (1877, 3 A.C. 279), a case of marine insurance, Lord Chancellor Cairns (p. 284) lays down as a well-known principle of law 'that where one person has agreed to indemnify another he will on making good the indemnity be entitled to succeed to all the ways and means by which the person indemnified might have protected himself or reimbursed himself for the loss.' Accordingly, it seems clear that but for the terms of clause 9 of the policy in this case the defenders could have had no answer to the pursuer's claim to be reimbursed for their full loss, and that on indemnifying them for their loss, but not until they had done so, they would have been entitled to enforce against the proprietors of *John Bull* all claims competent to the pursuer against that company. Had clause 9 of the policy merely embodied the common law rights of the defenders as above set forth I should have had no hesitation in granting decree at this stage. But that clause expressly provides that if at the time of the loss or damage there be any other insurance covering the property affected by the fire the defenders 'shall not be liable *to pay* more than their rateable proportion of the loss or damage.' This appears to me to amount to an agreement that if the loss is covered by another policy the defenders are not liable to indemnify the pursuer for his full loss as they would be bound to do at common law, but are never to pay more that their rateable proportion, and accordingly I hesitate to pronounce decree of payment for the full sum until the alleged right of the pursuer to recover from the proprietors of *John Bull* has been finally determined. The clause does not apparently anticipate any dispute between the parties as to whether or not there is another insurance covering the loss, and the question next arises on whom rests the duty of determining the question, which can only be done by an action against the proprietors of *John Bull*. The defenders alone have any financial interest in the alleged liability of the proprietors of *John Bull* to the pursuer, and it is they who aver that such a liability exists and can be enforced. Had the defenders been left to depend on their common law rights it is they who would have had to incur the expense of bringing to a final determination any difference that may exist as to the rights of the pursuer against the proprietors of *John Bull*—see MacGillivray on Insurance, p. 740. The terms of clause 9 of the policy in this case do not, in my opinion, place the defenders in any better position in relation to the alleged difference between the pursuer and the proprietors of *John Bull* than they would have been in had the clause been absent from the contract, except in so far as it excuses them from making full payment at once, and accordingly it appears to me that it is for them, and not for the pursuer, to take such action as they may consider necessary or expedient to determine that question and to establish the truth of their averments. If required the pursuer must, of course, assign to the defenders all claims competent to him as against the proprietors of *John Bull*, although I think it is doubtful whether this is necessary. Meantime, I shall repel the defenders' first plea-in-law and continue the cause for one month to enable them to decide whether they are to take action against the proprietors of *John Bull* or not. In the event of their declining to do so, I shall then sustain the pursuer's second plea-in-law and grant decree as craved."

The defenders reclaimed, and argued—The advertisement in the newspaper was an offer which the pursuer had accepted by filling up and sending in the coupons. There was therefore a completed contract of insurance, apart altogether from the certificate of registration, and the declaration in that document that there was no contractual liability could have no effect—*Hunter* v. *General Accident Fire and Life Assurance Corporation, Limited*, 1909 S.C. 344, *per* Lord Kinnear at p. 353, 46 S.L.R. 150, 1909 S.C. (H.L.) 30, 46 S.L.R. 786. But, in any event, the question being one of the defender's liability under the conditions of the policy, was a difference arising out of the policy, and fell within the arbitration clause—*Jureidini* v. *National British and Irish Millers' Insurance Company, Limited* [1915], A.C. 499; *Stebbing* v. *Liverpool and London and Globe Insurance Company, Limited* [1917], 2 K.B. 433; *Woodall* v. *Pearl Assurance Company, Limited* [1919], 1 K.B. 593.

Argued for the pursuer—The pursuer was entitled to decree. It was clear on the face of the document described as the certificate of registration that there was no contract of insurance. There was therefore no question for an arbitrator—*Parochial Board of Greenock* v. *Coghill & Son*, 1878, 5 R. 732.

LORD PRESIDENT (CLYDE)—In this case the pursuer holds a policy with the defender's company insuring certain household furniture against the risk of injury or destruction by fire, the insured amount being £150. A fire occurred, and a claim was made, and in answer to that claim the company founded upon condition 9 of the policy which restricts their liability "if, at the time of the loss or damage, there should

be any other insurance effected by the insured, or by any other person, covering the property." The contention of the company (now maintained as a defence to the present action) was that the pursuer's furniture was covered at the date of the fire by an insurance effected through a newspaper called *John Bull*. The pursuer admits having signed and delivered two coupons forming part of an advertisement in *John Bull* with reference to a "free insurance scheme," the conditions of which were set forth in a printed document circulated along with that newspaper. But he denies that any insurance was effected thereby, and he adds that a claim he sent in to the newspaper was not entertained. Condition 10 of the defending company's policy provides that "all differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed by the parties in difference."

The defending company says that the disputed question—whether the pursuer had effected an insurance with *John Bull* (so as to bring condition 9 of the policy into operation)—constitutes a "difference arising out of this policy," and must therefore be referred to arbitration.

It is not enough to compel resort to arbitration that the defenders say that a difference of the kind remitted to arbitration has arisen. As was pointed out by Lord Adam in *Mackay & Son* v. *The Leven Police Commissioners* (1893, 20 R. 1093, at p. 1102), the Court is entitled and bound to see that such a question is truly raised. There must, in short, be a real question, and it must be of the kind which the contract between the parties appropriates to the determination of arbiters. It is therefore not merely permissible but necessary to examine the defending company's allegations concerning the insurance said to have been effected with *John Bull*, for if there is any real difference between the parties it is as to whether an insurance was effected or not. The substance of those allegations depends on the terms of the advertisement of the "free insurance scheme," the coupons, and the printed conditions mentioned above, and to which we were referred at the debate. The advertisement invited the readers of *John Bull* to fill up two coupons in order to obtain the benefits of the scheme. The first coupon, which was to be posted (and which the pursuer did sign and post) to *John Bull*, was to the following effect:—"I have sent an order form to my newsagent for the regular weekly delivery of *John Bull*. Please register me as a regular reader." The second coupon which was to be handed to the reader's newsagent (and which the pursuer signed and handed to his newsagent) was a form of order for the delivery of the newspaper until further notice. Along with the newspaper there was also circulated a printed document containing the conditions of the scheme to which the advertisement and coupons refer. It is headed "Free Insurance Gift," and is described as a certificate of registration of the first of the two kinds of coupons to which I have already referred. According to this document the newspaper announces that it "will give" certain sums in certain specified events (such as accident, fire, and sickness), and also a number of other forms of insurance benefit. Among the conditions appended there is the following in paragraph (*m*):—"In order to comply with the requirements of the law the proprietors of *John Bull* have to announce that while this free insurance scheme does not involve any contractual liability it has the financial backing and support of Odham's Press, Limited (the proprietors of *John Bull*), whose issued share capital is over £1,250,000." How can it be said that an insurance has been effected by participation in a "free insurance scheme" which involves no contractual liability on the part of anybody, and therefore provides no indemnity? Condition (*m*) makes it perfectly clear that there is no contract, no obligation, no indemnity—in short, no insurance whatever. When condition 9 of the defending company's policy speaks of an insurance having been effected, it is unmistakably obvious that a contract of indemnity is meant. There is thus no room for difference of opinion on the question which the defenders say has arisen; and the case therefore appears to me to fall within the principle applied in the *Parochial Board of Greenock* v. *Coghill & Son* (1878, 5 R. 732). The relevancy of the defence accordingly fails.

LORD SKERRINGTON—The defenders have failed to demonstrate that there is any question which they would be entitled to ask an arbitrator to decide in their favour. It is plain on the face of the documents that there was no insurance covering the property which was burnt, other than the insurance effected with the defenders. Accordingly, as the amount of the loss has been assessed by the defenders' assessor and is not in dispute, the only course open to us is to sustain the first and second pleas-in-law for the pursuer and to give decree for the amount claimed.

LORD CULLEN—I am of the same opinion.

LORD SANDS—I concur.

The Court recalled the Lord Ordinary's interlocutor and granted decree in favour of the pursuer.

Counsel for the Pursuer and Respondent—Maclaren, K.C.—Ingram. Agent—John Robertson, Solicitor.

Counsel for the Defenders and Appellants—Wark, K.C.—Guild. Agents—Cairns & Robertson, S.S.C.