

It is further claimed by the plaintiff that the letter of the state agent to the assured estops the company from disputing the fact that the policy had not lapsed. But the policy expressly provides that no person except the president or secretary is authorized to make or waive contracts. The agent had no authority to put a construction upon this contract different from that which the law puts upon it.

Upon the whole, we have come to the conclusion that the plaintiff is entitled to a judgment for \$50, without costs, and as there was no tender made of the amount, no costs can be awarded to the defendant.

CROSSLEY *v.* CONNECTICUT FIRE INS. CO.

(*Circuit Court, D. Massachusetts, April 6, 1886.*)

FIRE INSURANCE—POLICY—PROVISION FOR ARBITRATION—CONDITION PRECEDENT.

A provision in a policy of fire insurance that in case any difference of opinion shall arise as to the amount of loss it shall be referred to arbitrators to be chosen as therein directed is not a condition precedent to a recovery for a loss, or to any proof on the trial of the amount of the loss.¹

At Law.

Gaston & Whitney, A. French, and G. F. Williams, for plaintiff.
J. D. Bryant and W. G. Russell, for defendants.

CARPENTER, J. This is an action at law on a policy of fire insurance. In advance of the trial, and from considerations of convenience, counsel have been heard to argue certain questions which will arise on the trial, in order that they may be provisionally determined. The same questions will also arise in the case of *Reed v. Fire Ins. Co. of Philadelphia*, and counsel therein have also been heard to argue those questions. The policies in question contain the following provisions:

"In case of any loss or damage the company, within sixty days after the insured shall have submitted a statement as provided in the preceding clause, shall either pay the amount for which it shall be liable or replace the property," etc. "In case any difference of opinion shall arise as to the amount of loss under this policy, it is mutually agreed that the said loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen: provided, that neither party shall be required to choose or accept any person who has served as a referee in any like case within four months; and the decision of a majority of said referees in writing shall be final and binding on the parties."

At the trial of these causes evidence will be offered tending to show the amount of loss under the policy, but such evidence so offered will

¹See note at end of case.

not consist in any part of the award of referees appointed under the provisions of the clause last quoted. To the introduction of evidence so offered the defendants will object on the ground that the agreement for reference contained in the policy is to be construed to make the award of referees a condition precedent to any proof of amount of loss, or to make it the sole evidence as to such amount. When the testimony shall be closed, the defendants will pray a ruling that the verdict shall be for the defendants on the ground that the effect of the agreement for reference is to make such a reference a condition precedent to the right of the insured to recover.

Upon these two motions a vital question will be whether the agreement for reference is, on the one hand, a collateral contract, or, on the other hand, is expressly or by implication a condition precedent to recovery or to any proof of the amount of the loss. Upon examination of authorities, I am of opinion that the agreement is a collateral contract only. The questions which I have stated, as well as several other questions which in different views of the case might be material, have been argued very fully, and with great skill and learning, and abundant citation of authorities. The cases, however, upon which counsel on both sides mainly rely are but few in number.

The defendants refer to *Scott v. Avery*, 5 H. L. Cas. 811. The agreement in that case was "that the sum to be paid by this association to any suffering member for any loss or damage shall, in the first instance, be ascertained and settled by the committee; and the suffering member, if he agrees to accept such sum in full satisfaction of his claim, shall be entitled to demand and sue for the same as soon as the amount to be paid has been so ascertained and settled, but not before; which can only be claimed according to the customary mode of payment in use by the society; and if a difference shall arise between the committee and any suffering member relative to settling any loss or damage, * * * in such case the member dissatisfied shall select one arbitrator, * * * which three arbitrators, or any two of them, shall decide upon the claims and matters in dispute according to the rules and customs of the club, to be proved upon oath by the secretary." The defendants also refer to *Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250. In that case the contract was that "in case of an enlargement of the said canal the said president, managers, and company, and their successors and assigns, may also charge and collect an additional toll on coal transported in pursuance of this agreement, at a rate per ton of 2,240 pounds, to be established after the completion of such enlargement in the manner following, viz.," etc. In these two cases, therefore, it appears that the contract expressly was to pay such a sum as should be fixed by arbitration according to a prescribed plan.

The defendants claim, however, that the agreement here is made a condition precedent by a necessary implication. Against this view the plaintiffs cite, among other cases, *Dawson v. Fitzgerald*, L. R. 1