

Exch. Div. 257; *Schollenberger v. Phoenix Ins. Co.*, 7 Ins. Law J. 697; *Reed v. Washington F. & M. Ins. Co.*, 138 Mass. 572; *Clement v. British America Assur. Co.*, (Sup. Ct. Mass.) 5 N. E. Rep. 847. I therefore decide that should the questions to which reference has been made be raised before me in a trial of these cases with a jury, I should overrule the objection of the defendants, and permit the evidence of amount of loss to go to the jury; and I should overrule the request of the respondents for an instruction to the jury that the plaintiff is not entitled to recover.

NOTE.

It is said in *Gauche v. London & Lancashire Ins. Co.*, 10 Fed. Rep. 347, that the conditions in a policy of insurance requiring preliminary proofs, and a reference to arbitration in case of difference, are conditions precedent to a suit upon the policy.

It was held by the supreme court of Iowa in *Gere v. Council Bluffs Fire Ins. Co.*, 23 N. W. Rep. 137, that where a fire insurance policy provides that in case differences shall arise as to the amount of loss the subject shall be submitted to arbitration on the request of either party, and the award made in writing shall be binding as to the amount of loss or damage, it does not render an arbitration a condition precedent to the right of the insured to sue to recover a loss, but is nothing more than a mode of providing what should be deemed conclusive evidence of one of the facts.

A fire insurance policy provided for arbitration in case of loss. Through the failure and refusal of defendant to go on with the arbitration agreed upon it became ineffectual, and in the mean time, partly under orders of the city, the debris was removed. Defendant then requested plaintiff to submit to a second arbitration, which he refused to do, and brought this action. Held, that plaintiff having once consented to arbitrate, if the arbitration failed and came to an end from the fault of the defendants, the arbitration clause could not stand in the way of the action. *Uhrig v. Williamsburg City Fire Ins. Co.*, (N. Y.) 4 N. E. Rep. 745.

It is not infrequently provided in policies of insurance that any dispute arising under the policy shall be referred to arbitrators. Such agreements to arbitrate do not oust the courts of their jurisdiction. *Allegre v. Maryland Ins. Co.*, 6 Har. & J. 408; *Robinson v. Georges Ins. Co.*, 17 Me. 131; *Kill v. Hollister*, 1 Wils. 129; *Amesbury v. Bowditch Ins. Co.*, 6 Gray, 596.

Where the underwriters refused to pay the loss of the assured, his right of action has been held immediately to accrue, although there was a clause in the policy that payment was not to be made until 90 days after proof and adjustment of the loss, and that, in case of dispute, the same might be settled by arbitrators. *Allegre v. Maryland Ins. Co.*, 6 Har. & J. 408.

Under such a provision an action may be sustained without any offer to refer. *Robinson v. Georges Ins. Co.*, 17 Me. 131.

But if there be a reference depending, or made and determined, it might be a bar. *Kill v. Hollister*, 1 Wils. 129.

In *Avery v. Scott*, 8 Welsb., H. & G. 497, it was decided that, although an agreement which ousts the courts of their jurisdiction is illegal and void, yet an agreement in a policy of insurance as to arbitration was not of that description, since it did not deprive the plaintiff of his right to sue, but only rendered it a condition precedent that the amount to be recovered should be first ascertained, either by the committee or arbitrators.

In *Goldstone v. Osborn*, 2 Car. & P. 550, it was held that the insured might maintain an action on such a policy, notwithstanding the condition, when it appeared that the insurers denied the general right of the insured to recover, and did not merely question the amount of damage.

So he may, if the insurance company waive the right to a submission to arbitration, as by taking possession and repairing the thing insured. *Cobb v. New England M. Ins. Co.*, 6 Gray, 193.

The effect of an agreement to refer to arbitration, where no reference has taken place, cannot take away the jurisdiction of any court. See *Mitchell v. Harris*, 2 Ves. Jr. 129, and *Street v. Rigby*, 6 Ves. Jr. 814.

A simple agreement inserted in a contract that the parties will refer any dispute arising thereunder to arbitration will not bar a suit at law by either party upon the contract before an offer to arbitrate; but when the contract stipulates that the arbitration is to be a condition precedent to the right to sue upon the contract, or this may be inferred upon construction, no suit can be maintained unless the plaintiff made all reasonable effort to comply with the condition. *Perkins v. United States Electric Light Co.*, 16 Fed. Rep. 513.

It is said in *Old Saucelito Land, etc., Co. v. Commercial Union Assur. Co.*, (Cal.) 5 Pac. Rep. 232, that courts are not deprived of their jurisdiction because of a general provision in an agreement that all disputes which may arise in the execution shall be decided by arbitrators, but that the parties may agree upon some method to liquidate damages which in their nature are unliquidated; and until such method has been pursued, or some excuse for not doing so proven, no recovery can be had.

A provision in a contract whereby all disputes between the parties are to be submitted to arbitration before being made the subject of litigation in the courts is not binding upon the parties when the controversy arises out of the non-payment of a sum of money stipulated in the contract to be paid. *Sutro Tunnel Co. v. Segregated Belcher Min. Co.*, (Nev.) 7 Pac. Rep. 271.

MCGINNIS v. FARRELLY and others.

(Circuit Court, S. D. New York. March 26, 1886.)

PARTNERSHIP—SPECIAL PARTNER—PAYMENT OF CAPITAL BY CHECK—NEW JERSEY STATUTE.

The delivery before the filing of a certificate of special partnership, by a party intending to become a special partner to the general partners, of a check payable to their order, drawn on a bank, where he has funds to meet it, is not "an actual cash payment," within the meaning of the New Jersey statute, and will not entitle him to protection as a special partner.¹

At Law.

Abbett & Fuller, (Leon Abbett, of counsel,) for appellant.

John H. Shield, (W. C. Beecher, of counsel,) for plaintiff.

WALLACE, J. On the twenty-sixth day of February, 1883, the defendant Farrelly, with others, intending to form a limited partnership in which Farrelly was to be a special partner and the others general partners, executed a certificate in the form required by the laws of New Jersey, where the partnership business was to be carried on, which recited that the amount of capital contributed to the common stock by said Farrelly was the sum of \$2,500, and that the partnership was to commence on that day. Unless a limited partnership was formed pursuant to the statutes of New Jersey, the defendant Farrelly is liable to the plaintiff upon the demand in suit as a general partner. The question is whether the statutes of New Jersey were complied with.

The Revised Laws of New Jersey provide that such partnership may consist of one or more persons, who shall be called general partners, and of one or more persons who "shall be called special partners, and who shall contribute in actual cash payments a specific sum as capital to the common stock;" that a certificate shall be signed by the several persons, reciting, among other things, the amount of capital which shall have been contributed by the special partner;

¹See note at end of case.