

FIRE INSURANCE.

(By the late Mr. Justice Mackay.)

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CHAPTER XI.

ADJUSTMENT AND SETTLEMENT OF LOSSES.

[Continued from p. 119.]

§ 254. Reference to be made a condition precedent.

The terms of the policy, to oust the law courts, must make the reference a condition precedent to the right of the assured to institute a suit at law. As in *Scott v. Avery*,¹ the loss had, before suit, to be ascertained by a committee.

In a Georgia case, in 1874, *Liverpool, London & Globe Ins. Co. v. T. H. & W. Creighton*,² it was held that the condition, that in case of difference of opinion on the amount of the loss, such difference shall be submitted to the judgment of two disinterested men mutually chosen who, if they disagree, shall name a third whose award shall be binding upon both parties, will not oust the courts of law of jurisdiction, unless made a condition precedent to the right to sue.

In New Hampshire a condition for arbitration as to loss amount, but fixing no mode of securing arbitration is void, as an attempt to oust the ordinary courts of jurisdiction.³

Limitation of suit to 12 months is valid, yet if coupled with condition for arbitration agreement may defeat itself, for instance where either party can refuse to go into the arbitration (arbitration clause being loosely worded).—*Id.*

Arbitration clause in New York and Illinois, *Johnson v. Humboldt Ins. Co.*, *Hay v. Star F. Ins. Co.*, (both cases to be seen in 33 Amer. Rep.) "No suit for recovery of any claim by virtue of this policy shall be sustainable until after an award shall have been fixing the amount of such claim." *Semble*, such clause is lawful.

Are the persons here referred to arbitrators? If so, are they the arbitrators of C. P. C. 1341, 2, 3? Is Art. 1334 applicable, that the parties must be heard and evidence taken and reduced to writing, and Art. 1351, that

one arbitrator and assignee must agree? *Semble*, no. Reference to valuers may be meant sometimes, where the term arbitrators is used. Arbitrators may be bound to take evidence, or to call for it, while valuers have merely to look at goods.¹

In *Edwards v. Aberayron M. Ship Ins. Society*, Queen's Bench, A.D. 1876, then in Exch. Chamber, there was the following arbitration clause, and clause against bringing actions: Art. 39. The directors shall have full power to determine all disputes between the society and members concerning insurances, or claims upon the society; and the decision of the directors shall be final and conclusive as well upon the society as the members; and no member shall be allowed to bring any action or suit against the society for any claim upon the society except as is provided by these presents, and the directors may, if they think fit, cause any of such claims and the amount to be paid to any member to be referred to the decision of an average adjuster, and his decision shall be final and conclusive on the society and claimant, and no appeal shall be allowed therefrom.

The plaintiff claimed for a ship lost. The society repudiated the claim. The plaintiff sued. Defendant gained in the Queen's Bench; the Court referred him to the procedure of Art. 39, which, it held, did not exclude the jurisdiction of the courts of law, but made it a condition precedent to bringing an action that the loss should have been first decided as per Art. 39. The Exchequer Chamber reversed *that*, (two judges dissenting.) Art. 39 was held invalid, for not only the amount was too large to be determined as per Art. 39, but also the question of whether or not the society was liable at all. This clause 39 was held to erect a tribunal judicial. *Scott v. Avery* cannot support such a thing, it was held by the majority.

Amphlett, B., held that according to *Scott v. Avery* the agreement to settle all claims between the society and its members was not void as against the policy of the law; that the directors might decide "any dispute that might arise respecting insurances," the mere

¹ House of Lords cases.² Bennett.³ *Leach v. Republic F. Ins. Co.*, p. 97, Alb. L. J. of 1880, Vol. 1.¹ See *Lloyd v. Scottish Provincial Ins. Co.*, A.D. 1870, Montreal.