such cases both parties have agreed to arbitrate. Before action the company gave notice.

The great object is to give effect to agreements exactly as parties make them. An action would lie by the company against the plaintiff for the refusal to refer, but in that the damages would be nominal. It has been assumed in argument that these stipulations of the agreement do not give a pleadable defence. If so, I see no "sufficient reason" why the matters in difference should not be arbitrated on, and this application is the only means the company have of enforcing that power which the contract reserves to them.

I have been referred to several cases as to the distinction between a "valuation" merely and an arbitration. The former is not within the Common Law Procedure Act, section 167. But I think that it is an arbitration strictly, which is provided for here, not merely a "valuation." See for the distinction, *Mill* v. *Bayly*, 2 H. & C. 36; *Bos* v. *Helsham*, L. R. 2 Ex. 72; *Anglo Italian Bank* v. *De Rosaz*, L. R. 2 Q. B. 452; *Re Hopper and Barningham*, *Ib.* 367; *Re Lord*, 24 L. J. Ch. 145.

Order staying proceedings.

From the above order of Mr. Dalton the plaintiff appealed to a judge, and the matter was subsequently re-argued by the same counsel before Mr. Justice Gwynne, who, on the 7th July, delivered the following judgment, sustaining Mr. Dalton's order:

Gwynne, J.—It was agreed that the matter was brought before Mr. Dalton by consent, and no objection therefore was taken as to his jurisdiction to make the order, and it is now agreed that if necessary this motion may be treated as before me, not only by way of appeal from Mr. Dalton's order, but also by original application for an order for stay of proceedings upon the same material as was laid before him.

The question arises under a condition endorsed on a policy of insurance executed by the defendants with and in favor of the plaintiffs, and set out above.

It was admitted by both parties that these conditions did not make the ascertainment of the loss by arbitration a condition precedent to any right of action accruing as within the principle of *Scott* v. *Avery*, 8 Ex 497, and 5 H. L. C. 811; *Roper* v. *Lendon*, 1 El. & El. 825; *Braunstein* v. *Accidental Death Insurance Co.*, 1 B. & S. 782; *Elliott* v. *Royal Exchange Assurance Co.*, L. R. 2 Ex. 237. This point having been thus withdrawn from my consideration I express no opinion upon it.

In view of the matters in dispute which have arisen in respect of "merchandise or other personal property partially damaged," and of the general language of the 9th and 10th conditions taken together I desire merely to guard myself (as the point was not argued, but on the contrary waived), from being supposed to express any opinion upon the point.

Mr. Robinson's contention was, that the 167th section of the Common Law Procedure Act did not apply to such a provision in relation to arbitration as that extracted above from the 9th condition endorsed on the policy, for the reason, that, as he contended, there was no mutuality, as the plaintiffs could not enforce an arbitration, and whether there should be an arbitration or not rested in the sole will of the defendants.

That the clause was intended to have some effect there can be no doubt, and that, whatever may be its meaning, it forms part of the contract between the parties comprised in the policy of insurance, there can be no doubt. If the intention of the parties by making this clause a part of their contract was that it should operate in any given event to secure a determination of differences between the parties by an arbitration, then, upon the authority of *Russell* v. *Pellegrini*, 6 El. & Bl. 1020, 1029, and *Seligmann* v. *Le-Boutillier*, L. Rep. 1 C. P. 681, it must be admitted now that the intention of the clause in the Common Law Procedure Act was to enable the courts to carry out contracts to refer disputes, as far as might be.

Now the condition of the policy provides only for the case of differences between the parties "touching any loss or damage by fire to the parties insured." From the nature of the contract and of the condition, the assured are the only persons who in respect of such matter could be plaintiffs in an action at law, and the assurers are the only persons who could be the defendants in such action, and who could apply to the court for an order to stay proceedings in consequence of the action being brought in violation of the terms of the agreement to refer. To object then that the agreement is void for want of mutuality by reason of the assured not being placed in a position of being entitled equally with the assurers to the benefit of the 167th section is to object, that there can be no valid agreement in a policy of insurance to refer to arbitration the question touching any loss or damage suffered, if that alone be the matter in difference. What the section contemplates providing for is the case of an action being brought by a plaintiff notwithstanding an agreement contained in the instrument for a reference to arbitration in a given event, which it is contended by the defendants has arisen. Now I do not see how it can be judicially held that the clause in the 9th condition relating to arbitration shall have no effect at all for want of mutuality, because it provides only for a case in which the assured alone ever could be plaintiffs in an action relating to the matter in difference.

The expression in the clause, "The company reserves to itself the power of having the loss or damage submitted to the judgment of arbitrators," may not be a felicitous expression, but I think effect can and should be given to it notwithstanding.

This condition being by the policy declared to be part of the contract involved in the policy, it will then read: "It is agreed between the parties hereto that in case differences shall arise touching any loss or damage the company reserves to itself the power," or, "shall have, the power of having the loss submitted to the judgment of arbitrators." The plaintiffs agree that the company shall have the power of having the loss or damage submitted to the judgment of arbitrators.

The agreement in substance is, that in the event of the plaintiffs making a claim for loss or damage from the risk insured against, and in the