

with train No. 13, and damaged the plaintiff in the sum of \$2,001 by inflicting personal injuries upon him. The negligence of the engineer and conductor of train 14 was the proximate cause of the accident, and they were negligent in violating the telegraphic order, and leaving Marshall Junction before train No. 13 met and passed them. Upon these agreed facts the court below ordered judgment for the plaintiff for the stipulated damages, to which defendant excepted. Judgment was entered pursuant to the order, to reverse which this writ of error was sued out. The only error assigned is that the court erred in ordering judgment for the plaintiff.

John C. Bullitt, Jr., and Tilden R. Selmes, for plaintiff in error.

C. Wellington and W. W. Erwin, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The facts in this case bring it clearly within the decision of the supreme court in *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, and the judgment below is affirmed, with costs.

CENTRAL RAILROAD OF NEW JERSEY v. STOERMER.

(Circuit Court of Appeals, Second Circuit. July 20, 1892.)

1. PLEADING AND PROOF—ADMISSIONS.

In an action against a railroad company for personal injuries to plaintiff, an averment in the complaint that one of defendant's trains, at the place where plaintiff was employed, was suddenly started by defendant or its agents, without notice to plaintiff, causing the injuries complained of, was controverted by a general denial, but an averment that defendant was, at the same time and place, "operating a railroad," was expressly admitted; and it appeared in proof that only one railroad was being operated at that time and place. *Held*, that defendant could not be permitted to contend that the railroad was not operated by itself.

2. PERSONAL INJURY—FELLOW SERVANT—NEGLIGENCE.

While a coal train of defendant railroad company, whose tracks ran over the docks of a coal company, was delivering coal to the latter company, a brakeman of the coal company, engaged in coupling cars of the train, was injured by the negligence of defendant's engineer. *Held*, that such engineer was not a fellow employe of the injured brakeman, he not being under the power and direction of the coal company, engaged exclusively in doing its work or "lent" to it for the occasion. *Evans v. Lippincott*, 47 N. J. Law, 192; *Johnson v. Boston*, 118 Mass. 114; *Rourke v. White Moss Colliery Co.*, 46 Law J. C. P. 233,—distinguished.

Error to the Circuit Court of the United States for the Southern District of New York.

Action by Paul C. R. Stoermer against the Central Railroad of New Jersey. Judgment for plaintiff. Defendant appeals. Affirmed.

This action was brought by Stoermer, a brakeman in the employ of the Lehigh & Wilkesbarre Coal Company at Bergen point, N. J., to recover damages for personal injuries alleged to have been sustained by

negligence of the Central Railroad of New Jersey. The particular negligence alleged consisted in starting a train of coal cars without notice or warning to the plaintiff, who was at the time engaged in coupling. The usual course of business was that plaintiff, upon a signal from the engineer, should step in between two cars to couple, or uncouple them, and, having done so, should step back and indicate by a signal to the engineer that all was ready. Until such signal was given, the engineer was not to start the train. On this occasion it was claimed that the engineer started the train before the plaintiff gave such signal, and the plaintiff sustained severe injuries in consequence. The road was at the time in the hands of receivers. Plaintiff recovered a verdict in the court below, and a writ of error was duly allowed. The other facts, so far as they are material to the points decided, are sufficiently set forth in the opinion.

Robert W. De Forest, for plaintiff in error.

Leopold Leo, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Upon the record in this case the plaintiff in error is not entitled to claim that the trial court erred in refusing to direct a verdict in its favor on the ground that there was no proof of negligence on its part because its road was at the time operated by receivers. The second paragraph of the complaint alleged, in substance, that "on April 4, 1887, while plaintiff was employed at Bergen Point, New Jersey, by the Lehigh & Wilkesbarre Coal Company, one of the trains of the defendant, at the point or place where plaintiff was so employed, was suddenly started by defendant or its agents, without notice or warning to the plaintiff, while the plaintiff was lawfully between two cars of said train," causing the injuries complained of. The averments of this paragraph are controverted by the general denial in the answer, and, if there were nothing else in the pleadings, would fairly present an issue whether or not the railroad by whose operation the accident was alleged to be caused was in fact operated by the defendant at the time. But the whole pleadings are to be construed together; and the complaint also averred in its first paragraph "that the defendant was at the time hereinafter mentioned * * * operating a railroad, among other places, at the point or place where the plaintiff was injured." This allegation defendant expressly admitted. It must therefore, for the purposes of the action, be taken as true, (Code Civil Proc. N. Y. § 522; *Dunham v. Cudlipp*, 94 N. Y. 129;) and when it appeared, as it did in the proof, that only one railroad was being operated at the time and place of the accident, defendant cannot be permitted to contend that it was not operated by itself, but by some one else. Under these pleadings, plaintiff came into court to sustain by proof the affirmative of no such issue.

It is assigned as error that the trial judge refused to direct a verdict in favor of the defendant on the ground that "the negligence, if there be such, was the negligence of fellow servants." The accident happened upon the dock of the Wilkesbarre Lehigh Coal Company at

Bergen Point, over which run the tracks of the Central Railroad of New Jersey. The negligence which caused the accident was that of Paulman, the engineer. He was selected, appointed engineer, and placed in charge of this engine by the receivers of the plaintiff in error, and received his pay from them. The proof does not sustain the contention of the plaintiff in error that his service had at the time been transferred from the railroad to the coal company. The business he was engaged in was delivering coal from the main line of the railroad company to the coal company upon its dock by the operations of defendant's railroad. This was the business of the railroad company, and he remained its servant, although an agent of the coal company exclusively directed when and whereabouts on the dock the cars should be dumped, what cars should be brought in and taken out. As the defendant in error was exclusively in the employ of the coal company, the engineer was not his fellow servant. The case is to be distinguished from *Ewan v. Lippincott*, 47 N. J. Law, 192; *Johnson v. Boston*, 118 Mass. 114; *Rourke v. White Moss Colliery Co.*, 46 Law J. C. P. 283—by the circumstance that the proof does not show that the engineer was, under the power and direction of the coal company, engaged exclusively in doing its work, or hired by it from his original employers, or "lent" to it to perform its work. The question as to whether plaintiff's own negligence contributed to the accident was properly left to the jury, and their finding is conclusive. Judgment affirmed.

SMITH v. PREFERRED MASONIC MUT. ACC. ASS'N.

(Circuit Court, D. Indiana. July 13, 1892.)

No. 8,732.

ACCIDENT INSURANCE—ARBITRATION CLAUSE IN POLICY—EFFECT ON JURISDICTION.

A certificate of membership in a mutual accident association provided that "any claim under this certificate shall, if the association require it, be referred to arbitration, * * * and no suit or proceeding at law or in equity shall be brought to recover any sum under this insurance, unless the same shall be commenced after 90 days, and not later than one year," after the alleged accident. Held, that the arbitration clause constitutes no condition precedent, and cannot be pleaded in bar or abatement in a suit on the certificate; such clause not ousting the court of jurisdiction, but simply referring the question of the amount of damage to arbitration.

At Law. Action by Mary F. Smith against the Preferred Masonic Mutual Accident Association. Judgment for plaintiff on demurrer to the answer.

S. M. Shepard, for plaintiff.

Charles Martindale, for defendant.

BAKER, District Judge. This is an action on a certificate of membership in a mutual accident association. The defendant answers in abate-

ment. The answer alleges that among the covenants and conditions in the certificate in suit, which is copied in full in the complaint, is the one which follows:

"(f) Any claim under this certificate shall, if the association require it, be referred to arbitration; the board of arbitrators to be composed of not less than three, nor more than five, master Masons in good standing, an equal number to be selected by the association and the claimant, the other member to be selected by the arbitrators; such arbitration to be held at the office of the association at Detroit, Michigan, the expense thereof to be borne equally by the association and the claimant; and no suit or proceeding, at law or in equity, shall be brought to recover any sum under this insurance, unless the same shall be commenced after ninety days, and not later than one year, from the time of the alleged accidental injury."

The answer further alleges that the defendant notified the plaintiff that under said clause it required that the claim of the plaintiff should be submitted to arbitration, and the defendant requested the plaintiff to unite with it in selecting arbitrators and arranging the time for holding the arbitration. It alleges that the plaintiff accepted said request, but before the arbitrators could be appointed she withdrew her consent, and refused to submit her claim to arbitration. It also alleges that the defendant has always been, and is now, ready and willing to submit the question of its liability to arbitration, as provided in said certificate, and to abide by and pay any award that such arbitrators should make. To this answer the plaintiff demurs, alleging that it does not state facts sufficient to constitute a cause of action in abatement.

The condition above quoted provides that "any claim" under the certificate shall, on the request of the association, be submitted to a board of arbitrators for decision. It is difficult to determine whether the condition should be construed as requiring every question of liability and damage to be so referred to arbitration or not. The language is broad enough to justify such construction. The frame of the answer indicates that the pleader so understands it. But such a construction ought not to be adopted as will render the clause illegal. Contracts ought to receive such a construction as will give effect to the language employed. To hold that this condition required every matter of difference between the parties to be submitted to arbitration would render it illegal. It has been decided in many cases that parties cannot by contract oust the courts of their ordinary jurisdiction. After a careful review of the authorities, Bacon, in his work on Benefit Societies, (section 450,) says:

"It is a settled principle of law that parties cannot by contract oust the courts of their jurisdiction, and agreements to refer to future arbitration will not be enforced in equity, and will not be sustained as a bar to an action at law or a suit in equity."

The principle is applicable to courts of equity as well as in courts of law:

"And where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement, in case of any disputes, to refer the same to arbitrators, courts of equity will not, any more than courts of law, interfere to

enforce that agreement, but they will leave the parties to their own pleasure in regard to such agreements. The regular administration of justice might be greatly impeded or interfered with by such stipulations, if they were specifically enforced. And, at all events, courts of justice are presumed to be better capable of administering and enforcing the real rights of the parties than any mere private arbitrators, as well from their superior knowledge as their superior means of sifting the controversy to the bottom." 1 Story, Eq. Jur. § 670.

The weight of adjudged cases announces the same doctrine. *Scott v. Avery*, 5 H. L. Cas. 811; *Insurance Co. v. Morse*, 20 Wall. 445; *Reed v. Insurance Co.*, 138 Mass. 572; *Badenfeld v. Association*, 154 Mass. 77, 27 N. E. Rep. 769; *Hobbs v. Insurance Co.*, 56 Me. 421; *Mentz v. Insurance Co.*, 79 Pa. St. 478; *Supreme Council v. Forsinger*, 125 Ind. 52, 25 N. E. Rep. 129.

Giving a narrow construction to the clause in question, and treating it as a stipulation not ousting the court of its ordinary jurisdiction, but simply as referring the question of the amount of loss or damage to arbitration, it may be held valid. I think the condition ought to receive such a construction. Thus construed, is the clause a condition precedent,—one which must be performed, if requested by the defendant, before a suit can be maintained,—or is it an independent covenant, for whose breach damages may be recovered in an independent action, but which cannot be pleaded in bar or abatement of a suit on the certificate? It seems to me plainly to belong to the latter class. Where the contract provides in terms, or by necessary implication, that the money secured by the policy of insurance is not to become payable until the amount of loss or damage has been determined by the award of arbitrators, no action can be maintained until such award has been made or waived. In such case the making or the waiving of the award becomes a condition precedent to the accruing of the right of action. Such is the principle on which the case of *Hamilton v. Insurance Co.*, 136 U. S. 242, 10 Sup. Ct. Rep. 945, is decided. The court there says:

"The conditions of the policy in suit clearly and unequivocally manifest the intention and agreement of the parties to the contract of insurance, that any difference arising between them as to the amount of loss or damage of the property insured shall be submitted, at the request in writing of either party, to the appraisal of competent and impartial persons, to be chosen as therein provided, whose award shall be conclusive as to the amount of such loss or damage only, and shall not determine the question of the liability of the company; that the company shall have the right to take the whole or any part of the property at its appraised value so ascertained; and that until such an appraisal shall have been permitted, and such an award obtained, the loss shall not be payable, and no action shall lie against the company. The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss, and to the maintenance of any action." 136 U. S. 254, 255, 10 Sup. Ct. Rep. 949.

The clause in the certificate at bar does not in terms, or by necessary implication, make the award a condition precedent to the maintenance of any action. It is silent as to the effect of a refusal by the assured to arbitrate. The court ought not to read into it a condition not written

therein by the parties, which shall operate to oust the court of its ordinary jurisdiction. In the case of *Hamilton v. Insurance Co.*, 137 U. S. 370, 11 Sup. Ct. Rep. 133, the policy in suit provided that—

“In case differences shall arise touching any loss or damage after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy.”

It was held that the refusal of the assured to perform this condition did not preclude the maintenance of a suit by him; that to have such effect the policy should have further provided that no such action should be brought until after the award. To the same effect are *Crossley v. Insurance Co.*, 27 Fed. Rep. 30; *Reed v. Insurance Co.*, 138 Mass. 572; *Badenfeld v. Association*, 154 Mass. 77, 27 N. E. Rep. 769.

Counsel for the defendant has called the attention of the court to the case of the *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116, 44 N. W. Rep. 1055, and the case of *Morley v. Insurance Co.*, 85 Mich. 210, 48 N. W. Rep. 502, as holding a contrary doctrine. In this claim counsel is mistaken. In the first of these cases the policy of insurance expressly provided that “the amount of loss or damage shall be ascertained by arbitration, and shall not be payable until it is so ascertained by arbitration, and that such arbitration shall be a condition precedent to bringing suit on the policy.” It was held that this condition was reasonable and valid, and that no suit could be maintained until the condition had been performed or its performance waived. It is clear that the court would have reached a different conclusion if the language in the policy before it had been similar to that in the certificate under consideration. The condition in the policy in the case last above cited provided that the money secured by it should not become payable until the amount of the loss or damage should be first ascertained by the award of arbitrators. The court followed the doctrine announced in its former decision. It follows that the answer in abatement is insufficient. Let the demurrer be sustained, with leave to the defendant to answer over.

THE MIRANDA.

UNITED STATES v. THE MIRANDA *et al.*

(Circuit Court of Appeals, Second Circuit. July 20, 1892.)

SHIPPING—LIGHT MONEY—FOREIGN-BUILT VESSEL—COLLECTOR'S CERTIFICATE.

A foreign-built unregistered vessel, which carries a collector's certificate that the owner is an American citizen, and that the bill of sale for such vessel was valid and duly recorded in the United States customhouse, is in possession of such regular document as is required by Rev. St. § 4226, and exempt from payment of light money, under Rev. St. § 4225, on entering a port of the United States. 47 Fed. Rep. 315, affirmed.