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APPRAISALS OF LOSS AND DAMAGE UNDER INSURANCE POLICIES

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INTRODUCTORY

It is a long standing practice among insurance companies to include in policies covering property loss and damage a provision to the effect that if, in event of loss or damage, the parties fail to agree upon the amount thereof, the matter shall be submitted to third persons to ascertain and

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This study of appraisals under insurance policies is an elaboration and extension of treatment of the subject as prepared for Professor Sturges' forthcoming treatise on Arbitration.

award the amount. This provision is intended to provide a mode of settlement rather than to litigate the matter. The provision contemplates a determination of the amount of money to be paid by the insurer—not merely an inventory of the property lost and damaged. Its use in fire insurance policies probably is best known.

The use of these provisions began before statutory standard fire insurance policies were inaugurated; standard policy forms carry such a provision in most American jurisdictions.

Prior to the statutory form of policy the terms of these provisions and their integration in the policies of the different companies varied considerably. Standard policy legislation brought about more uniformity.

The legal career of these provisions—their validity, revocability and enforceability—and appraisals and awards under them is truly an interesting one. Many judicial decisions and various statutes have contributed to its make-up. Although the use of the provision is made mandatory in a majority of the American jurisdictions by standard policy legislation, this mode of settlement of differences arising between the insured and insurer over the amount of loss and damage is rarely used. When the parties fail to agree, they litigate. To invoke the provision accomplishes little beyond adding technicalities of pleadings and proof and collateral issues to the litigation. This is the result of judicial decisions relating to the provision. There has been almost no legislative endeavor to make the appraisal process more useful.

Accordingly, this study must seek its reward in projecting promise for the usefulness of this mode of settlement of the differences referred to if and when it shall be adequately implemented by competent legislation. With such aid, its promise seems as apparent as modern statutory arbitration. It also is concluded that for any legislative reform to be fully effective in this field, it must reckon with the various legal traditions to which the provision and appraisals thereunder are now heir and how best to disown or redirect many of them.

The appraisal as a mode of settlement of the differences referred to has been likened to common law arbitration in various particulars and differentiated in others. A substantial part of the judicial decisions have involved these comparisons; in others, however, no such comparisons appear. In the latter cases, it is generally assumed that the appraisal or the agreement therefor is an *arbitration* or *arbitration agreement*, as the case may be.

The break-down in the use and usefulness of this mode of settlement of the differences referred to is attributable in considerable part to judicial decisions dealing with revocability of the appraisal provision. Collateral doctrines, such as "waiver," have been reared in these cases. These doctrines have been woven into a labyrinth of technicalities in which the provision can rarely survive and function. Judicial decisions also have cast shadows

over the parties' right of hearing in the appraisal proceedings. Some recognize the right, but others have limited or denied it.

Modern arbitration statutes have scarcely noticed this mode of settlement. Even when such recognition has been indicated, some judicial decisions have been reluctant to allow it. Availability of rights and remedies of the arbitration statutes is doubtful. In a few jurisdictions statutes strike down these appraisal provisions and invalidate proceedings under them.

These are the matters with which this study is concerned.

I

PROVISIONS FOR APPRAISAL OF LOSS AND DAMAGE—REVOCABILITY

1. *General*

It has been a much litigated question in British and American courts whether or not appraisal provisions should be held revocable in conformity with common law revocability of arbitration provisions generally.

More particularly stated, the question posed and answered has been whether or not, there being a loss, the insured can disregard the provision and sue to collect on the policy; whether or not the insurer can plead the provision to defeat any action brought by the insured before an appraisal to collect on the policy.

The answer to this general question, as determined by the British and most of the American courts, may be stated broadly as follows: If a provision to refer differences over the amount of loss or damage is properly drafted and adequately integrated with the insurer's undertaking in the policy to pay, it is irrevocable contrary to common law revocability of provisions to arbitrate disputes generally which may arise between the parties in the future. Otherwise, it is revocable.

How, in what terms, must the provision be drafted and integrated in the policy to attain irrevocability? When answered in the broad generalizations of judicial summaries in the cases, the provision must be drafted as a "condition precedent" to the insured's "right of action" to collect on the policy. If it is so drafted it is not revocable.¹ If it is not so drafted it is a "collateral" and "independent" undertaking, and is revocable because it is

1. U.S. *Hamilton v. Liverpool & London & Globe Ins. Co.*, 136 U.S. 242 (1890); *Gauche v. London & Lancashire Ins. Co.*, 10 Fed. 347 (5th Cir. 1881).

ALA. *Western Assurance Co. v. Hall*, 112 Ala. 318, 20 So. 447 (1895); *Ex parte Birmingham Fire Ins. Co.*, 233 Ala. 370, 172 So. 99 (1937) (also holding that the provision is a good defense at law, so there is no good cause to support a petition to transfer the action to the equity docket—the insurer's remedy at law is full and adequate).

CAL. *Adams v. South British & Nat. F. & M. Ins. Co.*, 70 Cal. 198, 11 Pac. 627 (1886); *Old Saucelito Land & Dry-Dock Co. v. Commercial Union Assur. Co.*, 66 Cal. 253, 5 Pac. 232 (1884).

FLA. *Southern Home Ins. Co. v. Faulkner*, 57 Fla. 194, 49 So. 542 (1909); see *New Amsterdam Casualty Co. v. Blackshear*, 116 Fla. 289, 156 So. 695 (1934).

GA. *National Fire Ins. Co. v. Lam*, 34 Ga. App. 246, 129 S.E. 116 (1925); *Southern Mut. Ins. Co. v. Turnley*, 100 Ga. 296, 27 S.E. 975 (1897).

against public policy in that it would "oust the courts of their jurisdiction."²

Before examining the cases for the detail of this draftsmanship and integration, reference will be made to certain aspects of the judicial process in accomplishing the irrevocability of these provisions. They are significant

IOWA. *George Dec & Sons Co. v. Key City Fire Ins. Co.*, 104 Iowa 167, 73 N.W. 594 (1897); *Zalesky v. Home Ins. Co.*, 102 Iowa 613, 71 N.W. 566 (1897).

LA. *Hart v. Springfield Fire & Marine Ins. Co.*, 136 La. 114, 66 So. 558 (1914).

ME. *Fisher v. Merchants Ins. Co.*, 95 Me. 486, 50 Atl. 282 (1901).

MASS. *Second Society of Universalists v. Royal Ins. Co. Ltd.*, 221 Mass 518, 109 N.E. 384 (1915) (provision in standard policy per St. 1907 c. 576); *Lamson Co. v. Prudential Fire Ins. Co.*, 171 Mass. 433, 50 N.E. 943 (1898) (Policy and provision in standard form per St. 1887, Ch. 214, § 60); see further *Hutchinson vs. Liverpool & London & Globe Ins. Co.*, 153 Mass. 143, 26 N.E. 439 (1891).

MICH. *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116, 44 N.W. 1055 (1890); see also *Kersey v. Phoenix Ins. Co.*, 135 Mich. 10, 7 N.W. 57 (1903).

MINN. *Mosness v. German-American Ins. Co.*, 50 Minn. 341, 52 N.W. 932 (1892); *Gasser v. Sun Fire Office*, 42 Minn. 315, 44 N.W. 252 (1890).

MO. *Offutt v. National Fire Ins. Co.*, 273 S.W. 161 (Mo. App. 1925); *Lance v. Royal Ins. Co. Ltd.*, 259 S.W. 535 (Mo. App. 1924); *Stevens v. Norwich Union Fire Ins. Co.*, 120 Mo. App. 88, 96 S.W. 684 (1906); *McNees v. Southern Ins. Co.*, 61 Mo. App. 335 (1895); *Murphy v. Northern British & Mercantile Co.*, 61 Mo. App. 323 (1895). See also, *Security Printing Co. v. Connecticut Fire Ins. Co.*, 209 Mo. App. 422, 240 S.W. 263 (1922); *Dworkin v. Caledonian Ins. Co.*, 285 Mo. 342, 226 S.W. 846 (1920); and *Foster, Arbitration and Appraisals* (1954) WASH. U.L.Q. 49.

N.J. *Liverpool, London & Globe Ins. Co. v. Wolff*, 50 N.J.L. 453, 14 Atl. 561 (1888).

N.C. *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 106 N.C. 28, 10 S.E. 1057 (1890).

OHIO. *Graham v. German American Ins. Co.*, 75 Ohio St. 374, 79 N.E. 930 (1907); *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258, 58 N.E. 805 (1900).

R.I. *Grady v. Home Fire & Marine Ins. Co.*, 27 R.I. 435, 63 Atl. 173 (1906) (under provision in standard policy per statute, 1896).

TENN. *Palatine Ins. Co. v. Morton-Scott Robertson Co.*, 106 Tenn. 558, 61 S.W. 787 (1901).

TEX. *American Central Ins. Co. v. Bass*, 90 Tex. 380, 38 S.W. 1119 (1897); *Scottish Union & Nat. Ins. Co. v. Clancy*, 83 Tex. 113, 18 S.W. 439 (1892); *Scottish Union & Nat. Ins. Co. v. Clancy*, 71 Tex. 5, 8 S.W. 630 (1880).

VA. *North British & Mercantile Ins. Co. v. Robinett & Green*, 112 Va. 754, 72 S.E. 668 (1911).

WIS. *Chapman v. Rockford Ins. Co.*, 89 Wis. 572, 62 N.W. 422 (1895) (under provision in standard policy then in effect).

Colorado and Washington refused to accept traditional common law revocability of provisions to arbitrate future disputes generally. *Ezell v. Rocky Mountain Bean & Elevator Co.*, 76 Colo. 409, 232 Pac. 680 (1925); *State ex rel. Fancher v. Everett*, 144 Wash. 592, 258 Pac. 486 (1927). Accordingly, it is not apparent that the foregoing requirements of draftsmanship were necessary in those jurisdictions to render appraisal provisions in insurance policies irrevocable by action. Concerning the situation that developed in Washington, see *Sturges and Sturges, Some Confusing Matters Relating to Arbitration in Washington*, 25 WASH. L. REV. 16 (1950). Consult also, *Anderson v. Hartford Accident & Indemnity Co.*, 152 Ore. 505, 53 P.2d 710 (1936).

Nor is it apparent that such details of draftsmanship remained important to effect irrevocability in Minnesota after common law revocability of provisions to arbitrate future disputes generally was ruled out in that state in 1941. See *Park Construction Co. v. Independent School District*, 209 Minn. 182, 296 N.W. 475 (1941).

2. U.S. *Mutual Fire Ins. Co. v. Alvord*, 61 Fed. 752 (1st Cir. 1894). See further *Hamilton v. Home Ins. Co.*, 137 U.S. 370 (1890); *Connecticut Fire Ins. Co. v. Hamilton*, 59 Fed. 258 (6th Cir. 1893); *Crossley v. Connecticut Fire Ins. Co.*, 27 Fed. 30 (1st Cir. 1886).

GA. *Atlas Assur. Co. Ltd. v. Williams*, 158 Ga. 421, 123 S.E. 697 (1924); *Goldberg v. Provident Washington Ins. Co.*, 144 Ga. 783, 87 S.E. 1077 (1916); *Liverpool, London & Globe Ins. Co. v. Creighton*, 51 Ga. 95 (1874).

not only for the question at hand, but also for their bearing upon the common law tradition of revocability of arbitration provisions generally.

It is clear from British and American cases in which the irrevocability of these provisions has been decided that they have been and are identified as provisions *for arbitration*.³ Neither the courts nor counsel considered

ILL. Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329, 18 N.E. 804 (1888).

IOWA. Hansell v. Farmers' Mut. Hail Ins. Ass'n, 209 Iowa 378, 228 N.W. 88 (1929) (Policy covering crops damaged by hail); Mellrath v. Farmers Mut. Hail Ins. Ass'n, 114 Iowa 244, 86 N.W. 310 (1901) (same); Read v. State Ins. Co., 103 Iowa, 72 N.W. 665 (1897); Leisure Lumber Co. v. Mutual Fire Ins. Co., 101 Iowa 514, 70 N.W. 761 (1897); Gere v. Council Bluffs Ins. Co., 67 Iowa 272, 23 N.W. 137, 25 N.W. 159 (1885).

KAN. Continental Ins. Co. v. Wilson, 45 Kan. 250, 25 Pac. 629 (1891) (the court emphasized that the text of the provision for appraisal was only permissive and optional). See Stephenson v. Piscataqua F. & M. Ins. Co., 54 Me. 55 (1866).

MASS. Badenfeld v. Massachusetts Mut. Acc. Ass'n, 154 Mass. 77, 27 N.E. 769 (1891); Reed v. Washington Fire & Marine Ins. Co., 138 Mass. 572 (1885).

N.Y. Gibbs v. Continental Ins. Co. 13 Hun. 611 (Sup. Ct. App. Div. 1878); see also, Mark v. National Fire Ins. Co., 24 Hun. 565 (Sup. Ct. App. Div. 1881); *aff'd*, 91 N.Y. 663 (1883).

PA. The position of the Supreme Court of Pennsylvania with respect to the revocability of these provisions is not clear. See, for example, Mentz v. Armenia Fire Ins. Co., 79 Pa. 478 (1875).

With respect to provisions to arbitrate disputes generally which may arise between the parties in the future, Pennsylvania has ruled against common law revocability when the arbitrator is adequately "named" in the provision.

In some of the Pennsylvania cases ruling revocability of a provision in a fire insurance policy to refer differences over the amount of loss and damage, counsel or the court have taken note of the fact that the appraisers were not named. It seems safe to conclude from the cases that this fact has been at least a principal ground for ruling revocability.

See Needy v. German Ins. Co., 197 Pa. 460, 47 Atl. 739 (1931); Yost v. Dwelling House Ins. Co., 179 Pa. 381, 36 Atl. 317 (1897); Commercial Union Assur. Co. v. Rocking, 115 Pa. 407, 8 Atl. 589 (1887); Mentz v. Armenia Fire Ins. Co., *supra*; also statements in Gratz v. Insurance Co., 282 Pa. 224, 127 Atl. 620 (1925) (provision under standard policy form per statute of 1915); Penn Plate-Glass Co. v. Spring Garden Ins. Co., 189 Pa. 255, 42 Atl. 138 (1899). In Chauvin v. Superior Fire Ins. Co., 293 Pa. 397, 129 Atl. 326 (1925) the Court adds the confusing comment relating to the provision, namely, that "the appraisal . . . was merely a condition precedent to an action." (Italics supplied).

See also references to the Pennsylvania cases in Ford v. Grocers' Mut. Ins. Co., 4 F. Supp. 911 (W. D. Pa. 1931) and in Chapman v. Rockford Ins. Co., 89 Wis. 572, 62 N.W. 422 (1895).

A similar Scottish requirement that the arbitrator be named to render a general arbitration provision irrevocable was held inapplicable by the House of Lords to a provision to refer differences over the amount of loss and damage which was adequately drafted as a "condition precedent." Caledonian Ins. Co. v. Gilmour [1893] A.C. 85.

In Wright v. Susquehanna Mut. Fire Ins. Co., 110 Pa. 29, 20 Atl. 716 (1885) the court appears to have concluded that the provision was effectively drafted as a "condition precedent," but that the insurer had failed duly to invoke it and so the insured could sue. The appraisers were not named. See also, Fritz v. British American Assur. Co., 208 Pa. 268, 57 Atl. 573 (1904).

None of the foregoing Pennsylvania cases indicates that the Court gave any substantial consideration to the decision of the House of Lords in *Scott v. Avery* or to the American cases cited in the last preceding notes.

Wis. See Canfield v. Watertown Fire Ins. Co., 55 Wis. 419, 13 N.W. 252 (1882).

Wyo. See Kahn v. Trader's Ins. Co., 4 Wyo. 419, 34 Pac. 1059 (1893).

3. See the cases cited *supra*, notes 1 and 2. Also, the opinion of Mr. Justice Stone in the more recent case of Hardware Dealers' Mut. Fire Ins. Co. v. Glidden & Co., 284 U.S. 151 (1931).

them as being in any category separate from provisions for arbitration, such as, for example, provisions for "appraisal," "valuation" or otherwise. The technique of identifying and characterizing such provisions and the proceedings and determinations thereunder as embracing only the "mere," "subsidiary," "incidental," or "particular" matter of value or damage (and not "legal responsibility"), or as involving only "ministerial," and not "judicial" functions, which has been used in certain other groups of cases to differentiate them from arbitration, rarely appeared in the cases ruling upon the issue of revocability.

Furthermore, as indicated above, it was being ruled in substantially contemporary cases that when the provision fails of the required drafting it offends the common law which invalidates contracts to oust the courts of their jurisdiction. In other words, a provision to refer differences over the amount of loss and damage which is deficient in meeting the required condition precedent falls according to common law revocability of arbitration provisions generally; the insured can sue to collect on the policy without any regard for the provision.

It also may be observed that the necessary drafting of the appraisal provision and its integration with the insurer's undertaking to pay in order to make it irrevocable do not require the very words "condition precedent." Those words have no indispensable role; the required "condition precedent" has been derived by the courts by the process of "legal construction" of the provision and its setting in the policy.⁴

Again, while the drafting of the "condition precedent" to the insured's "right of action" determines the question of revocability of these provisions to refer differences over the amount of loss and damage under an insurance policy, the American cases which have passed upon the matter generally have held that like drafting will not work irrevocability at common law of a general arbitration provision whether in an insurance policy or in any other contract.⁵

4. Of course, the use of the very words may aid the conclusion that the provision meets the required condition. See *Lamson Co. v. Prudential Fire Ins. Co.*, 171 Mass. 433, 50 N.E. 943 (1894).

5. *Blodgett Co. v. Bebe Co.*, 190 Cal. 665, 214 Pac. 38 (1923); *Aaberg v. Minnesota Com. Men's Ass'n* 152 Minn. 478, 189 N.W. 434 (1922).

When a provision in a fire insurance policy is construed to cover disputes generally which may arise under the policy (rather than being limited to differences over the amount of loss and damage) it has been held revocable according to the common law tradition applicable to general arbitration provisions. The fact that such provision is contained in a fire insurance policy rather than in some other commercial contract does not appear to be of consequence.

ALA. Maryland Cas. Co. v. Mayfield, 225 Ala. 449, 143 So. 465 (1932). The provision was contained in a policy covering loss or damage to an automobile resulting from "accidental upsets." The court identified the provision according to the text of the defendant's answer pleading the provision as including "not only the quantum of the plaintiff's damages, but her right of action—the cause of action—and so

In short, the British and American courts quite deliberately accorded the parties to the insurance policy power to contract for irrevocability of these particular arbitration provisions and displace common law revocability applicable to other arbitration provisions. Their reasons for so ruling are not made very articulate or clear. They explain *how*, more than *why*. While there were, during the process, some judicial disclaimers of appreciation of any valid support for common law revocability of arbitration provisions generally,⁶ American courts at least were honoring it, as indicated above, in substantially contemporary cases involving these provisions.

While it was frequently observed in opinions of the courts ruling irrevocability that the scope of the provision was limited to the ascertainment of the amount of loss and damage and did not comprehend a determination of "liability," this limitation was no less manifest in the provisions which were being ruled "collateral" and "independent" and revocable. The "collateral" and "independent" provisions were not ruled revocable because they embraced "liability."

It also is worthy of note that none of the foregoing British or American cases—neither those holding irrevocable the adequately drafted provision, nor those holding revocable the provision that was not adequately drafted as a "condition precedent"—were made to turn upon any consideration of the rather exceptional circumstances attending the making of the insurance contract, especially the fire insurance policy. (And, it should be observed, conditions about to be cited have not been substantially changed by the standard policy legislation.) Generally, of course, the insurer writes the policy; the insured may take it or leave it. But prudence calls upon the

construed the stipulation is void as against public policy." See further, *New Amsterdam Cas. Co. v. Blackshear*, 116 Fla. 289, 156 So. 695 (1934).

MAINE. *Stephenson v. Piscataqua F. & M. Ins. Co.*, 54 Me. 55 (1866); *Robinson v. Georges Ins. Co.*, 17 Me. 131 (1840). The provision in the former case applied in the event "any difference or dispute shall arise in relation to any loss sustained or alleged to be sustained." It was regarded by the court as providing that, "in case differences shall arise under it [the policy], the whole subject, including both the right to recover and the amount of damages shall be determined by referees," and therefore revocable.

MINN. *Aaberg v. Minnesota Com. Mens' Ass'n*, *supra*, the provision was contained in a health and accident policy and read "if any difference should arise at anytime respecting the validity or adjustment of any claim thereunder, it should be submitted to arbitrators, and that such submission . . . should be a condition precedent to the right to maintain a suit in court." Compare the subsequent Minnesota decision in *Park Constr. Co. v. Independent School Dist.*, 209 Minn. 182, 296 N.W. 475 (1941).

6. For such disclaimers see the opinions of Justice Coleridge, the Lord Chancellor and Lord Campbell in *Scott v. Avery* reported below.

Like views against common law revocability of arbitration provisions generally also had been voiced in widely known cases decided prior to most of the American cases ruling irrevocability of these appraisal provisions. See Allen, J. in *President of Delaware & H. Canal Co. c. Pennsylvania Coal Co.*, 50 Lans. 250 (N.Y. Sup. Ct., 1872); Chapman, C. J. in *Hood v. Hartshorn*, 100 Mass. 117 (1868).

man of property to take a fire insurance policy (it is required if the property is mortgaged). Neither counsel nor the courts in the cases establishing the rule of irrevocability appear to have considered this unilateral making of the policy with its requirements and conditions levied upon the insured as of any controlling significance in determining the issue of revocability. Instead, the policy generally is referred to as the contract of "the parties," as if it were negotiated and consummated by deliberate bargaining between the insured and insurer.⁷

Nor do the cases ruling irrevocability disclose any judicial concern as to how the provision, being irrevocable, might work. These decisions gave the insurer an extraordinary, if not unconscionable, advantage over the insured. This is true because the provision thus became enforceable by the insurer against the insured in an important respect while the insured could not, in most jurisdictions, enforce it against the insurer in any respect. Thus, when the parties fail to agree upon the amount of loss and damage, the insurer can claim appraisal and the insured must comply or forego any recovery on the policy. The insurer may, of course, choose to claim appraisal or to forego it. If it does not claim appraisal, it must pay the amount which the insured claims or stand suit with its costs, delays and expenses; the insured, at the same time, must take what the insurer offers, or bring suit to collect. In the latter situation the insured will nurse his adversity as best he can, together with the costs, delays and expenses of the action. Standard policy legislation wrought no substantial improvement in the operation of the irrevocable provision.⁸

But, as is pointed out below, the courts, avowedly undertaking to rescue the insured from the irrevocable appraisal provision and forfeiture of his rights to collect on the policy, have ruled a labyrinth of "waivers" against the insurer whereby it loses its formal rights under the irrevocable provision.

It also is worthy of notice that the courts do not appear to have felt called upon to rule revocability of any of these appraisal provisions in order to protect the insured from an unconscionable or "crafty contract"; nor were they deterred from ruling irrevocability in apprehension that the provision would thereby become a tool of oppression for the insurer and a sanctuary for it against its obligations under the policy. The judicial crusade to save the insured from the provision to refer differences over the amount of loss and damage in insurance policies came after (and, it may be said, as a result of) decisions of the courts and standard policy legislation making it irrevocable.

7. Compare McCrary, J. in *Wallace v. German-American Ins. Co.*, 41 Fed. 742 (C.C.N.D. Iowa, 1882).

8. These matters are the subject of comments in *Randall v. American Fire Ins. Co.*, 10 Mont. 340, 25 Pac. 953 (1891); *Maines v. Automobile Ins. Co.*, 112 Misc. 656, 183 N.Y.Supp. 690 (Sup. Ct. 1920); *aff'd* 190 App. Div. 921, 187 N.Y.Supp. 943 (1st Dep't 1921).

Such was the course of the judicial process and the focal point of its concern in the British and American cases establishing the irrevocability of the provision in an insurance policy to refer disputes over the amount of loss and damage. It was one of the first of the exceptions to be made in Anglo-American cases to common law revocability of arbitration provisions in commercial contracts.

Most of the American cases establishing the irrevocability of provisions when properly drafted were decided in the 1890's. All of them were decided after *Scott v. Avery*⁹ (reported below) in which the House of Lords in 1856 finally settled the irrevocability in British law of a properly drafted provision in a marine policy to refer disputes over the amount of loss and damage. Quite clearly most of the American courts, in holding irrevocability of the provision, were persuaded by the views which prevailed in *Scott v. Avery*.

Consideration will now be given—beginning with *Scott v. Avery*—to the necessary terms of such a provision and of its integration in the policy to validate it against common law revocability as applied to arbitration provisions generally.

2. *Same—Scott v. Avery*

The decision of the House of Lords in this case was the first final adjudication in Anglo-American law that “the parties” to an insurance policy covering loss and damage to property can, if they adequately draft it as a “condition precedent,” make irrevocable a provision therein to refer their differences over the amount of loss and damage to the determination of third persons to be selected by them. The provision was contained in a marine policy covering a ship against loss from perils of the sea.

By this decision “the parties” were accorded this power over the objection of the plaintiff, the insured, that to so rule would offend the long standing common law taboo against contracts to oust the courts of their jurisdiction.

Certain pronouncements by the Lord Chancellor (Cranworth) and by Lord Campbell as expressed in their opinions before the Lords also have rendered the case a *cause célèbre* as to whether or not it also determined that parties can by like draftsmanship make irrevocable a provision in a policy or other commercial contract to arbitrate controversies generally which may arise between them in connection with the policy or other contract.

The case has many citations. Some of them, it has been found, are difficult to verify by the case, and some, of course, are equally difficult to reconcile. Diversities in the several opinions rendered in the case may well explain some of this.

9. 5 H.L. 811, 10 Eng. Rep. 1121 (1856).

In view of these traditions of the case, it is reported herewith in considerable detail.

The insured sued to recover on three policies of insurance on a ship. The case was centered on only one of the policies, it being deemed typical of the others.

In pleas to the action the defendant set forth the following Rule 25 of a certain Insurance Association which was incorporated by reference and made a part of the policy.

Rule 25 as set out in the plea read as follows: [A] "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 [a committee representing the insurer], and the suffering member [the insured], *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. [B] *And if a difference shall arise between the committee and any suffering member, relative to the settling of any loss or damage, or to claim for average, or any other matter relating to the insurance*, in such case the member dissatisfied shall select one arbitrator on his or her behalf, and the committee shall select another. And if the committee refuse for 14 days to make such selection, the suffering member shall select two, and in either case the two selected shall forthwith select a third, 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 on oath by the secretary. . . . And in all cases where arbitration is resorted to, the settlement of the committee to be wholly rescinded, and the statement begun *de novo*. [C] *Provided always (and it is hereby expressly declared to be a part of the contract of insurance between the members of this association), that no member who refuses to accept the amount of any loss as settled by the committee, hereinbefore specified, in full satisfaction of such loss, shall be entitled to maintain any action at law, or suit in equity, on his policy, until the matters in dispute shall have been referred to, and decided by, arbitrators, appointed as hereinbefore specified; and then only for such sum as the said arbitrators shall award. And the obtaining of the decision of such arbitrators on the matters and claims in dispute, is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit.*" (The letters in brackets, [A] [B] [C], and the italics have been added to facilitate subsequent references to the different parts of the provision.)

Defendant's pleas to the declaration also set forth that the committee proceeded to ascertain and settle the loss (as contemplated in [A] above) but that, before it had completed its work, "a difference and dispute arose,

which has ever since existed [relating to said insurance,] to wit, *as to the extent of the said loss, and as to the repairs done to the said ship, and as to the sum to be paid by the said association to the plaintiff in respect of such loss;*" that the committee was ready and willing "to refer", but plaintiff refused to do so, "and the matters of the said difference and dispute have not nor has any of them been referred to arbitrators or decided"; that the committee did not refuse or neglect to ascertain the loss as alleged by the plaintiff; that the committee did within reasonable time ascertain the sum to be paid; that the plaintiff refused to accept that sum and thereupon, before this action. "a difference and dispute arose, which has ever since existed between the said committee and the said Plaintiff, relating to the said insurance, to wit, *as to the extent of the said loss, and as to the sum to be paid by the said association to the Plaintiff in respect of such loss;*" that the defendant and committee "were willing to refer, but this the Plaintiff refused." (Italics supplied.)

Plaintiff demurred to these pleas and defendant joined in demurrer.

In the Court of Exchequer,¹⁰ the plaintiff's demurrer was unanimously sustained; judgment was rendered for the plaintiff in a per curiam opinion.

The Court of Exchequer Chamber reversed by unanimous decision, and judgment was entered for defendant.¹¹

The insurer reiterated in the House of Lords the same position which it advanced in the Court of Exchequer Chamber, namely, that under the foregoing terms of the policy, in event of difference arising between the parties as to the amount of loss, the undertaking of the company was to pay only such amount as should be determined by arbitration. Such was defendant's construction of the policy with its provision to refer.

"It is conceded," to quote counsel for the insurer in the Court of Exchequer Chamber, "that if there is an absolute and unqualified covenant or agreement to do certain things, and then follows a substantive and independent covenant or agreement, that, if any dispute shall arise as to those matters, it shall be referred to arbitration, that would be no bar to any action. *This, however, is not the case of any agreement to pay the actual loss, followed by an agreement to refer to arbitration any dispute respecting it, but an agreement to pay a sum to be ascertained by the committee, or if there is any difference, by arbitrators.*"¹² (Italics supplied.)

In the House of Lords, counsel also put the matter as follows: "*There is no principle in law which prevents a man from agreeing to pay to another the sum which a third shall declare to be the fair value of goods sold, nor*

10. 8 Ex. 487, 155 Eng. Rep. 1442 (1853).

11. 8 Ex. 497, 155 Eng. Rep. 1447 (1853).

12. One may wonder how remote this thesis may have been from the insurer's day-by-day sales promotion.

any which prevents a similar agreement as to the compensation to be paid for doing or not doing a particular act.

"Then is this an absolute covenant to pay the loss the Plaintiff claims, or to pay the sum which certain persons are to declare to be the amount of the loss? It is clearly the latter." (Italics supplied.)

Counsel for the insured reiterated what had been emphasized in the Court of Exchequer Chamber, namely, the comprehensive coverage of the provision to refer and that, if it were sustained, it would unlawfully oust the courts of jurisdiction. "If a difference, however simple, should arise between the committee and the suffering member, the whole matter would be opened, and it would be competent for the arbitrators to entertain any question of law or fact, and also to decide whether or not anything was due."¹³ (Italics supplied.) That: "This is a contract of indemnity, with a collateral and superadded machinery for settling disputes in lieu of the ordinary legal tribunals."

Before the House of Lords this view was urged again; that the provision to refer, "while it pretends only to affect the amount of the claim, it really involves the principles on which that claim is founded. Total loss, average loss, deviation, and all other matters, are included within it. The words of the condition itself are, not merely any difference as to the amount, but also any other matter relating to the insurance."

Also: "This is said to be nothing but an agreement to ascertain an amount, but then the reference to ascertain it must come after a difference, after a cause of action accrued, and consequently it is an agreement to exclude the courts from jurisdiction, upon an existing cause of action. If so, the case cannot be brought within that class of cases in which work is to be done, and the sum due for it is to be ascertained by a third person previously nominated, for in those cases the cause of action only arises on the sum having been ascertained." (Italics supplied.)

The House of Lords sustained the judgment of the Court of Exchequer Chamber for the insurer. Question had been framed to the Judges for their advisory opinion "whether, looking at the record in this case, the judgment

13. It has been held that the arbitrators may, and should, award "no loss," when they ascertain that there was no loss or damage. See *F. M. Skirt Co. v. Rhode Island Ins. Co.*, 316 Mass. 314, 55 N.E.2d 461 (1944) (under Massachusetts standard policy then in effect). Said the court:

The plaintiff's position is that by submitting the matter to arbitration the defendant is estopped to deny that a loss was sustained; that it may be heard only on the question of the amount of loss; and that an award that determined that no loss was sustained was not within the scope of the reference. We think that this construction of the policy is not sound. Obviously the referees would not have the right under such a reference to determine whether a loss, if sustained, was covered by the policy or whether the policy had ever taken effect; in other words, to decide questions pertaining to liability. But the right to determine 'the amount of loss' carries with it by necessary implication the right to determine that none existed.

ought to be given" for the plaintiff or for the defendant. Three of the Judges were of opinion for the plaintiff; four of them, the Lord Chancellor, and Lord Campbell were of opinion for the defendant.

It was the concensus of the opinions rendered in the House of Lords that the question at hand involved the "true construction" of the contract of insurance with its provision to refer. The prevailing view sustained the defendant's construction. By the same token, it denied the plaintiff's contentions that the contract was one "to indemnify him for the loss of his ship," that the provision to refer was an "independent and collateral agreement" and "that all disputes relative to the insurance should be settled by arbitration" so as not to contravene the principle of law that the jurisdiction of the Courts of Westminster cannot be ousted by the agreement of the parties.

Justice Coleridge elaborated upon the views which he had expressed in the case for the Court of Exchequer Chamber. He reiterated that the defendant's was the "true construction of the agreement," and observed upon that point as follows: "*If two parties enter into a contract, for the breach of which in any particular an action lies, they cannot make it a binding term, that in such event no action shall be maintainable, but that the only remedy shall be by reference to arbitration. Whether this rests on a satisfactory principle or not may well be questioned; but it has been so long settled, that it cannot be disturbed. The courts will not enforce or sanction an agreement which deprives the subject of that recourse to their jurisdiction, which has been considered a right inalienable even by the concurrent will of the parties. But nothing prevents parties from ascertaining and constituting as they please the cause of action which is to become the subject-matter of decision by the courts. Conventanting parties may agree that in case of an alleged breach the damages to be recovered shall be a sum fixed, or a sum to be ascertained by A.B., or by arbitrators to be chosen in such a manner; and until this is done, or the non-feasance be satisfactorily accounted for, that no action shall be maintainable for the breach. . . .*"

"I certainly am not disposed to extend the operation of a rule which appears to me to have been founded on very narrow grounds, directly contrary to the spirit of later times which leaves parties at full liberty to refer their disputes at pleasure to public or private tribunals. *And I think the judgment of the Court of Exchequer Chamber stands on a safe distinction between an agreement which would close entirely the access to the courts of law and that which only imposes as a condition precedent to the appeal to them, that the parties shall have first settled by an agreed on mode the precise amount to be recovered there.*" (Italics supplied.)

Justice Crowder also agreed with the defendant's construction of the policy and provision; declared that it "was clearly the intention of both

parties;" and as for its legality, he concluded: "I am not aware of any legal objection to such a contract, whatever may be thought of its prudence."

The opinions of the Justices favoring judgment for the plaintiff and revocability of the provision to refer emphasized its broad coverage; that it embraced any and all differences arising under the contract; that the arbitrators were, as Justice Compton put it, "to decide other matters than those of mere amount." He continued as follows: "It could not, I think, be intended that after the award of the arbitrators it should be open to the insurers to dispute the claim of the assured, on such grounds as unseaworthiness, deviation, want of interest, or of the loss not having happened through the perils insured against." And again: "*It is an agreement to insure against marine losses, but that no right of action shall arise until all disputes are settled by arbitration; in other words, that if disputes arise, the party shall be debarred from having recourse to the courts of law for the settlement of such disputes.*" (Italics supplied.)

Baron Alderson also viewed the provision as ousting the courts of their jurisdiction, contrary to law, for it delegated to the arbitrators "the entire and exclusive determination of every possible question as to the law of insurance in the case of a loss," and left to the courts of law "the insignificant authority of enforcing, if necessary, by suit, the fiat of the arbitrators."

Baron Martin, who likewise regarded the provision as embracing "any question of difference which might arise upon the contracts," considered that the parties were "merely to make use of the courts to enforce the award of the arbitrators." He also cited what he considered to be the broad purpose of the rule of revocability which should govern in such cases, as follows: "*It was said that the real ground of the judgment in the cases where the agreement to refer was held not to bar the action was, that they were independent covenants; but this is most certainly not so. The true ground I believe to be, that a prospective agreement not to have recourse to the courts of law or equity of the country in respect of future causes of action to arise, is against the liberty of the law, which secures to everyone the right of submitting to the courts any matters in respect of which he claims redress.—Sheppard's 'Touchstone' (p. 122)."*¹⁴ (Italics supplied.)

14. And in the books there was the Note of the case of Kill v. Hollister, 1 Wils. K.B. 129, 95 Eng. Rep. 532 (1846) as follows:

This is an action upon a policy of insurance, wherein a clause was inserted, that in case of any loss or dispute about the policy it should be referred to arbitration; and the plaintiff avers in his declaration that there has been no reference. Upon the trial at Guildhall the point was reserved for the consideration of the Court, whether this action well laid before a reference had been? And by the whole Court—if there had been a reference depending, or made and determined, it might have been at Bar, but the agreement of the parties cannot oust this Court; and as no reference has

There was, of course, opposition to the foregoing view that the provision to refer was not confined to the matter of ascertaining the amount of loss and therefore fell by the traditional common law rule of revocability. Justice Cresswell advanced this view; that while the provision (Part [B]) embraced differences relative to "any loss or damage, or to a claim for average, or any other matter relating to the insurance," and that the word "claim" applied not only to average, but also to "any other matter," it was intended to apply "*only to the amount of such claim, and merely provides another mode of inquiring into the same matters which have been before the committee.*" (Italics supplied.) Accordingly, he concluded, "In all this I find no attempt to prevent the courts from exercising their jurisdiction in ascertaining and adjudicating upon the rights of the parties arising out of the contract which they have made."¹⁵

been, nor any is depending, the action is well brought, and the plaintiff must have judgment.

There also was the case of *Thompson v. Charnock*, 8 T.R. 139, 101 Eng. Rep. 1310 (K.B. 1799) in which the defendant, in an action brought on a charter party, pleaded a provision that "in case any difference should arise between the parties touching the agreement, or anything relating thereto, the same shall be settled and adjusted by three arbitrators to be chosen, . . ." Upon demurrer to the plea and joinder, the demurrer was sustained. Lord Kenyon, C.J., observed that "it is not necessary now to say how this point ought to be determined if it were *res integra*, it having been decided again and again that an agreement to refer all matters in difference to arbitration is not sufficient to oust the Courts of Law or Equity of their jurisdiction."

For further British cases involving general arbitration provisions and decided before *Scott v. Avery*, see *Williams, The Doctrine of Repugnancy In the Law of Arbitration*, 60 L.Q.Rev. 69, 70, 71 (1944).

15. Justice Coleridge in the Court of Exchequer Chamber expressed like opinion on this point as follows:

But supposing any observation might be made upon the generality of one or two of the expressions in the rule [Rule 25], it is important to observe, that, *in this particular case, the only matter in dispute is as to the extent of the loss or repairs, so that it is brought within the terms of the first clause of the rule [See [B] in Rule 25] which gives the key to the whole.* (Italics supplied).

The provision in the policy in the first *Hamilton* case, *supra* note 1, which the Supreme Court of the United States held irrevocable, embraced differences "as to the amount of any loss or damage, or as to any question, matter, or thing concerning or arising out of this insurance," and that the award should be binding "as to the amount of such loss or damage, or as to any question, matter or thing so submitted, but shall not decide the liability of this company." (Italics supplied.)

No consideration appears to have been given to the point whether or not the provision was so broad as to constitute it a provision to arbitrate differences beyond those over the amount of loss. The Court appears to have considered the provision as one covering differences over the amount of loss or damage. Compare *Stephenson v. Piscataqua F. & M. Ins. Co.*, 54 Me. 55 (1866).

In *Liverpool & London & Globe Ins. Co. v. Wolff*, 50 N.J.L. 453, 14 Atl. 561 (1888) the provision was of broad coverage embracing differences "as to the amount of any loss or damage, or as to any question, matter, or thing concerning or arising out of this insurance." It was argued for the plaintiff that this provision related not merely to the amount of the loss or damage, "but to the whole matter of the controversy growing out of the policy, and is therefore void, as it is an attempt to oust the courts of their jurisdiction." But the court ruled that the first part of the provision referring the question of the amount of loss "is distinct and several from the latter and more comprehensive provision; the consequence being that, although the latter would not be enforced, the former will be." See also, *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 106 N.C. 28, 10 S.E. 1057 (1890). Compare *Maryland Cas. Co. v. Mayfield*, 225 Ala. 449, 143 So. 465 (1932).

Being in accord with the prevailing view of the Judges, the Lord Chancellor also was certain that "there can be no principle or policy of the law which prevents parties from entering into such a contract as that no breach shall occur until after a reference has been made to arbitration. It appears to me that in such cases as that, the policy of the law is left untouched."

He also took account of the view that the arbitrators were to decide "not the mere amount, but other matters" which, he said, "were ingeniously suggested at Your Lordships' bar." He expressed himself as not being "at all clear" that the stipulation did not have the broader coverage. "I observe," he said, "the learned judges differed about that." But, he continued, "*I do not think it necessary to go into that, because I am quite prepared to say that, in my view of the case, that makes no difference at all.*" (Italics supplied.)

Lord Campbell's opinion closed the case before the House of Lords.

He concluded, "After a very deliberate and dispassionate consideration of the case," that the contract, in this case "is as clear as the English language could make it" to the effect that "no action should be brought against the insurers until the arbitrators had disposed of *any dispute that might arise between them. It is declared to be a condition precedent to the bringing of any action.*" (Italics supplied.)

And, with respect to the broad coverage of the provision to refer, he was of the opinion that it was broad; that "*it embraced not only the assessment of damage, the contemplation of quantum, but also any dispute that might arise between the underwriters and the insured respecting the liability of the insurers, as well as the amount to be paid.* If there had been any question about want of seaworthiness, or deviation, or breach of blockade, I am clearly of opinion that, upon a just construction of this instrument, until those questions had been determined by the arbitrators, no right of action could have accrued to the insured." (Italics supplied.)

And, granting the comprehensive coverage of the provision, "*what pretence can there be for saying that there is anything contrary to public policy in allowing parties to contract, that they shall not be liable to any action until their liability has been ascertained by a domestic and private tribunal, upon which they themselves agree? Can the public be injured by it?*"¹⁶ In answer to this question he declared: "*It seems to me that it*

16. Subsequent British cases have followed this view and have held irrevocable the given provision to refer *liability as well as amount of liability*, it being adequately drafted as a condition precedent to a cause of action on the policy. (The Arbitration Act of 1889 was, of course, in effect when these cases were decided.) Trainor v. Phoenix Fire Assur. Co., 65 L.T.R. 825 (Q. B. 1892); Scott v. Mercantile Acc. and Guarantee Ins. Co., 66 L.T.R. 811 (C.A. 1892) (a burglary policy). See also, Spurrier v. LaCloche [1902] A.C. 446; Woodall v. Pearl Assur. Co. [1919] 1 K.B. 593.

would be a most inexpedient encroachment upon the liberty of the subject if he were not allowed to enter into such a contract."¹⁷ (Italics supplied.)

But was there any decided case "which adjudged such a contract to be illegal?" If there were, "I should ask your Lordships to reverse it; for it would seem to me really to stand on no principle whatsoever."

Apparently referring to the principle of the invalidity of agreements to "oust the courts of their jurisdiction," he observed: "It probably originated in the contests of the different courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would altogether deprive any one of them of jurisdiction." He would formalize the true statement of that principle, as follows: "*Where an action is indispensable, you cannot oust the Court of its jurisdiction over the subject, because justice cannot be done without the exercise of that jurisdiction.* That is all, and there is no doubt about that. This is the foundation of the doctrine that Courts are not to be ousted of their jurisdiction."

He was certain, moreover, that no case of which he was aware would be overturned by sustaining the judgment for the defendant. He was certain that the earlier cases decided only "*that if the contract between the parties simply contain a clause or covenant to refer to arbitration, and goes no further, then an action may be brought in spite of that clause, although there has been no arbitration. But there is no case that goes the length of saying, that where the contract is as it is here, that no right of action shall accrue until there has been an arbitration; then an action may be brought, although there has been no arbitration. Now, in this contract of insurance it is stipulated, in the most express terms, that until the arbitrators have determined, no action shall lie in any court whatsoever. That is not ousting the courts of their jurisdiction, because they have no jurisdiction whatsoever, and no cause of action accrues until the arbitrators have determined.*"

And finally: "*Here the plea is, that the arbitrators have not decided as to the liability of the underwriters, or the amount to be recovered, and therefore an action will not lie.*" (Italics supplied.)

In summary: By the prevailing view the given arbitration provision was irrevocable by action—and this notwithstanding (1) the broad cover-

17. In the preceding year Lord Campbell had indicated that common law revocability of arbitration provisions was no longer, if ever it had been, sustained by any considerations of public policy. He said:

There seems at one time to have prevailed in our Courts a horror of domestic forum which I can neither sympathize with nor account for; but the Legislature has recently in The Common Law Procedure Act, 1854, § 11 made a provision in such cases not that the agreement to refer shall be pleadable in bar, but that the Court may stop the action. This shows the opinion of the Legislature that such agreements are not contrary to public policy.
Livingston v. Ralli, 5 El. & Bl. 132, 119 Eng. Rep. 430 (Q.B. 1855).

age of the provision (Section [B] in the quoted text) and (2) the contention of the plaintiff (insured) and of the minority of the Judges that to so hold would transgress the common law rule invalidating contracts to oust the courts of their jurisdiction.

The issue involved the "true construction" of the terms of the policy, including the appraisal provision, and the defendant's (insurer's) construction was the correct one, namely, that the undertaking of the insurer in the policy was, in event of difference coming between the parties as to the amount of loss, to pay only such amount as should be determined by arbitration pursuant to the provision.

3. *Same—Provisions Involved In Early American Cases*

The appraisal provision involved in the early American cases first ruling irrevocability was expressed and woven into the fire insurance policies (frequently of a British Company) according to a pattern and set of terms substantially as follows: It was included under a general heading of "conditions" for the "adjustment of loss and payment thereof." It followed recitals of conditions or requirements that the assured should, among other things, take inventory of the lost and damaged property, permit examinations by the Company and make and file with the Company proof of loss as prescribed. Thereupon, "the amount of sound value and of the loss or damage shall be determined by agreement" of the parties. But, if "*differences shall arise as to the amount of any loss or damage,*" then such differences "*shall,*" "*at the written request of either party,*" be submitted to "*competent and impartial persons*"—one to be chosen by each party, and the two "shall select an umpire to act with them in case of their disagreement." The award in writing of any two of them "shall be binding and conclusive as to the amount of such loss or damage," but it "*shall not decide the liability of this company.*" And "until such proofs, declarations and certificates are produced, and examinations and appraisals permitted, *the loss shall not be payable,*" (or, "*shall not be payable until sixty days after*" the preliminary proofs, etc., "*including an award by appraisers, when an appraisal has been required.*")

Also, there may be no abandonment of the insured property to the Company, and "the company reserves the right to take the whole or any part thereof at its appraised value."

Lastly, when appraisal is duly required, it is "*expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery, until after an award shall have been obtained fixing the amount of such claim in the manner above provided.*" Not all of the quoted text appeared in all of the cases; and there were, of course, some variations from the quoted text. This summary, however, is believed to

be typical; it is based largely on the terms of the policy in the first *Hamilton* case decided by the Supreme Court of the United States.¹⁸

The decision of the Supreme Court of the United States holding the foregoing provision irrevocable was its first decision on the point. In voicing the unanimous opinion of the Court, Justice Gray briefly summarized the terms of the provision as set forth above and thereupon concluded as follows:

"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.

"Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country." (Italics supplied.)

Upon like analysis and conclusion rested the other American cases first holding such a provision irrevocable by action. They were thus supported by *Scott v. Avery*.

The detail and technicality of making this condition precedent is more fully illustrated by the second *Hamilton* case¹⁹ decided by the Supreme Court in the same year, but holding that the given provision was revocable.

The case involved the same insured and the same fire and property as were involved in the first case. The insurer and policy were different. The Supreme Court concluded, again in an opinion by Justice Gray, that the terms of the policy and appraisal provision were "essentially different in import and controlling elements" from those of the policy involved in the first case. The opinion is neither precise (nor meaningful in parts) as to what were considered to be the shortcomings in the terms of this policy that disqualified the arbitration provision from irrevocability. It is concluded from the whole opinion, however, that the Court was of the opinion that the arbitration provision was not tied in with the undertaking of the insurer to pay in such manner as to postpone or condition the liability to pay any loss, in event of differences as to the amount of loss and damage, until they were arbitrated and award rendered.

In commenting upon the terms of the policy in the earlier case the Court pointed out that "the policy contained, not only a provision that *until such an appraisal the loss should not be payable*, but [also] an express condition that *no action upon the policy should be sustainable in any court until after such an award*." This policy contained neither. Counsel for insurer conceded that there was no express provision in this

18. *Hamilton v. Liverpool & London & Globe Ins. Co.*, *supra* note 1.

19. *Hamilton v. Home Ins. Co.*, *supra* note 2.

policy "that no action should be sustainable upon the policy until an award"; and the Court likewise expressly observed that "there is no provision whatever postponing the right to sue until after an award." (Italics supplied.) It is equally clear that there was no express provision in the policy that no loss should become payable until appraisal and award. Indeed, it may be noted, although the Court did not comment upon it, that the policy fixed the maturity of the insurer's obligation to pay without reference to or regard for any appraisal and award in event of difference over the amount. The policy covered loss and damage by fire to the amount of \$5,000 "to be paid sixty days after due notice and proofs of the same shall have been made by the assured and received at the office of the company in New York." This provision lent itself to a construction that the policy vested in the insured the right to collect on the policy upon the conclusion of the designated sixty days, without regard for, and without being conditioned by, the provision as set out in subsequent parts of the policy for referring to arbitrators differences arising over the amount of loss and damage. And so, arbitration was not made a condition precedent "to the payment of any loss," which, in the opinion of the Court, so distinctly appeared in the make-up of the policy in the first case.²⁰

In short, since *neither* the "loss payable" postponement, nor the "no action" condition was written into the insurer's undertaking to pay on the policy, the arbitration provision was "separate and independent," and therefore, revocable.

It remains to speculate upon the *Hamilton* cases that if a condition precedent expressed in either set of words were incorporated in the insurer's undertaking to pay, the appraisal provision would qualify for irrevocability. This is suggested from the Justice's approval in the second one of these cases of the following rather obscure text from the opinion of the Court of Exchequer in *Dawson v. Fitzgerald*²¹ in which it is stated: "There are two cases where such a plea [of the appraisal provision] as the present is successful: *first*, where the action can only be brought for the sum named by the arbitrator; *secondly*, where it is agreed that no action shall

20. Search for the alternative, namely, whether the insurer's undertaking is to pay a sum at a time (or upon an event) stated, or to pay only what sum, if any, shall be ascertained and determined by the arbitrators is ever present in these cases. The decision of the majority in *Scott v. Avery* turned on the point.

See further the following British cases decided after *Scott v. Avery*; *Viney v. Bignold*, 20 Q.B.D. 172 (1887); *Braunstein v. Accidental Death Ins. Co.*, 1 B. & S. 782, 121 Eng. Rep. 904 (Q.B. 1861) (policy covering accidental injury or death).

Also: *Reed v. Washington F. & M. Ins. Co.*, 138 Mass. 572 (1885) (under the Massachusetts standard form then in effect); *Gasser v. Sun Fire Office*, 42 Minn. 315, 44 N.W. 252 (1890); *McNees v. Southern Ins. Co.*, 61 Mo. App. 335 (1895); *Gibbs v. Continental Ins. Co.*, 13 Hun. 611 (Sup. Ct. App. Div. 1878); *Chapman v. Rockford Ins. Co.*, 89 Wis. 572, 62 N.W. 422 (1895).

21. 1 Ex. D. 257 (1876). See also, *Liverpool & London & Globe Ins. Co. v. Creghton*, 51 Ga. 95 (1874); *Read v. State Ins. Co.*, 103 Iowa 307, 72 N.W. 665 (1897).

be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and, secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first. . . ."²² (Italics supplied.)

4. *Same—Provisions In Statutory Standard Policies*

As set forth above, when the American courts first ruled irrevocability of some appraisal provisions in some insurance policies, there were variations not only in the texts of the provisions but also in the terms integrating them in the policies of the different companies. The several companies had written their respective policies and the appraisal provisions therein much as they pleased.

Standard policy legislation reduced these variations considerably. The New York legislation has been most influential in this connection.²³ Legislatures of many other jurisdictions have from time to time either copied or incorporated by reference the New York policy. Maine, Massachusetts and Minnesota did not follow the New York provision; their respective provisions, however, have had little following. Significant variations from the New York provision are noted below. Accordingly, the New York appraisal provision is now in effect in more of the American jurisdictions than any other.

By this standard policy legislation the insurance companies, both domestic and foreign, must conform their policies and the text therein to

22. It seems unnecessary to use both of these texts for conditioning the insurer's undertaking to pay. While they are composed of different words, they appear to be of common purport, namely, in event of differences over the amount, to condition and postpone the obligation of the insurer to pay anything until the amount is determined by appraisal.

It has been pointed out that if by the one set of words there is no duty to pay anything until the amount, if any, is ascertained by appraisal, it is redundant, "absurd," to require further text to the effect that no action shall lie until award. See *Severns, J. in Connecticut Fire Ins. Co. v. Hamilton*, 59 Fed. 258 (6th Cir. 1893). See also *George Dee & Sons Co. v. Key Fire Ins. Co.*, 104 Iowa 167, 73 N.W. 594 (1897). (It may not be denied, however, that niceties of "construction" in some cases indicated the need of both the "no loss payable" postponement and the "no action" until award condition.) See *Swan, J. in the Connecticut Fire Ins. Co. case, supra*; *Mutual Fire Ins. Co. v. Alvord*, 61 Fed. 752 (1st Cir. 1894). Consult also, *Second Society of Universalists v. Royal Ins. Co.*, 221 Mass. 518, 109 N.E. 384 (1915) (provision under standard policy then in effect); *Badenfeld v. Massachusetts Acc. Ass'n*, 154 Mass. 77, 27 N.E. 769 (1891) (accident policy).

Under the British decisions since *Scott v. Avery* it appears that either type of text will do, namely, words *postponing payment of anything until award*, or those providing that *no action shall be brought before award*. See *Williams, The Doctrine of Repugnancy In the Law Of Arbitration*, 60 L.Q.Rev. 69, 75-76 (1944). It will be recalled that the text of the appraisal provision in *Scott v. Avery* embraced both types of text. See Part [C] reprinted, p. 10 *supra*.

23. Concerning the development of the standard policy movement see, *HUELNER, PROPERTY INSURANCE*, 25 *et. seq.* (1938); *PATTERSON, THE INSURANCE COMMISSIONER IN THE UNITED STATES*, 247 *et. seq.* (1927).

the form and text prescribed by the statute; they may not issue or use non-conforming policies within those jurisdictions.

It is clear enough that the New York standard policy legislation has contemplated at all times from the original enactment an irrevocable appraisal provision.²⁴

The current New York provision and its setting in the policy are as follows:²⁵

It appears in the policy under the general title: "*Requirements in case loss occurs.*" It follows requirements for giving notice of loss, for handling the property, making inventory thereof and filing proof of loss. Then, under the caption "*Appraisal,*" the provision is set forth as follows:

"In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting

24. The text of the present appraisal provision in the New York standard fire insurance policy was first arranged and spelled out under its present headings in the statutes in 1942. N.Y. Sess. Laws 1942 c. 900 § 6. It was re-enacted in 1943. N.Y. Sess. Laws 1943, c. 671, § 6.

Prior to these enactments the Legislature had adopted, in 1917, effective January 1, 1918, a standard form of policy which had been approved in 1916 by the National Convention of Insurance Commissioners. The policy was incorporated by reference; it was not written out in the statute. The policy was declared to be the "Standard fire insurance policy of the state of New York." The appraisal provision contained in this policy as made effective January 1, 1918 was substantially identical with that in present statute N.Y. Sess. Laws 1917, c. 440 § 121.

The 1917 enactment substituted its foregoing standard policy for an earlier "standard fire insurance policy of the state of New York." This earlier policy in turn, was originally planned in 1886. N.Y. Sess. Laws 1886, c. 488. By the 1886 enactment the Superintendent of the Insurance Department was directed to prepare a standard fire policy form and to file it with the Secretary of State. This policy had been designated as the "standard fire insurance policy of the state of New York." N.Y. Sess. Laws 1892, c. 690, § 121.

The appraisal provision in this policy as brought out pursuant to the 1886 legislation varied considerably from the present provision (§ 168) both in text and in the manner of its integration with the insurer's undertaking today. It seems, however, clearly to have been so drafted as to qualify for irrevocability under *Scott v. Avery*. The policy form with its appraisal provision is reprinted in CUMMING AND GILBERT, *INSURANCE LAWS OF NEW YORK*, 596 (1899).

25. The provision here reported is taken from the New York statutory standard form of fire policy. N. Y. *INSURANCE LAW* § 168.

him and the expenses of appraisal and umpire shall be paid by the parties equally.”

Following this text are statements of the Company's options to take the property at the agreed or appraised value, and to replace or rebuild; also the restriction against abandonment of any of the property to the company.

Next, under the title “*When loss payable*” is the following text:

“The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.”

And finally, under the heading “*Suit*” it is provided that:

“No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.”

The adoption of a provision to refer differences over the amount of loss and damage in a standard form of policy by legislative enactment, or by administrative action under legislative authority, foreclosed general charges against the provision of its being offensive to public policy.²⁶ But the question whether or not the provision was adequately framed and integrated in the policy as a “condition precedent” to the insured's “right of action” to collect thereon, was held not to be so foreclosed. Thus, in the Massachusetts case of *Reed v. Washington Fire and Marine Ins. Co.*²⁷ the provision in the standard policy then effective in Massachusetts (1885) was held inadequate to constitute the required condition precedent for irrevocability.²⁸ Said the supreme court in summarizing its construction of the provision and its integration with the insurer's undertaking to pay:

“In this case, the policy provides that, in case of loss, a statement shall be rendered to the company, and that the company, within sixty days after such statement shall be furnished, shall either pay the amount for which it is liable or replace the property. . . . The agreement [to refer]

26. *Crady v. Home Fire & Marine Ins. Co.*, 27 R. I. 435, 63 Atl. 173 (1906) (provision under standard policy per statute of 1896).

27. 138 Mass. 572 (1885) (standard policy per Pub. Sts. c. 119 & 139).

28. By the course of time and legislative changes it appears that the Massachusetts appraisal provision has reached the required condition precedent and irrevocability. See *Lamson Co. v. Prudential Fire Ins. Co.*, 171 Mass. 433, 50 N.E. 943 (1898) (provision under standard policy per St. 1887, c. 214); *Second Society of Universalists v. Royal Ins. Co.*, 221 Mass. 518, 109 N.E. 384 (1915) (provision under standard policy per St. 1907, c. 576); *F. M. Skirt Co. v. Rhode Island Ins. Co.*, 316 Mass. 314, 55 N.E.2d 461 (1944) (provision under standard policy per General Laws (Ter. Ed.) c. 175).

Concerning the situation in New Hampshire see *infra* p. 28.

is not incorporated with, but is distinct from, the promise to pay the loss, and from the provision, which is a condition of that promise, that a statement shall be furnished; it cannot take effect except with reference to a loss, which the company has promised to pay,—an existing cause of action; and it is simply an agreement to refer that matter to arbitration, without any agreement by the plaintiff not to sue.”²⁹

The constitutionality of state statutes prescribing standard policy forms with irrevocable provisions to refer differences over the amount of loss and damage and proscribing all other policy forms and provisions has been put in issue and sustained. Such statutes have been declared valid as against domestic and foreign insurance corporations alike and also as to individuals who would become insured.

Apparently, the first ruling of this kind was by the Supreme Court of Maine in an Opinion of Justices in 1903.³⁰ It was the consensus of the Justices that neither class of insurance corporation had any vested rights against such legislative regulation of their making of insurance policies.

The appraisal provision in the prescribed policy form recited that in case of differences over the amount of loss and damage it was mutually agreed that they should be referred, “*and such reference unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss.*”

Was not this an unconstitutional denial of the *rights of individuals* freely to contract for insurance, irrespective of its validity as to insurance corporations?

The opinion of the Justices covered this question as follows:

“The constitutional right of trial by jury is a right, not a duty, and may be waived by the individual. It is waived by him as to the assessment of his damages if he voluntarily enters into a contract like the statutory

29. The court further commented that although the legislature had prescribed the form of policy with the provisions therein, it is still to be regarded as the voluntary contract of the parties; that it is no more effective for or against either party than before; and that “it is not to be presumed that the Legislature intended, by prescribing the form of contract, and prohibiting any other, to give it effect in depriving a party rights which, as a contract, it would not have.” To like effect see *Chauvin v. Superior Fire Ins. Co.*, 283 Pa. 397, 129 Atl. 326 (1925) (provision under standard policy per 1915 statute); *Gratz v. Insurance Co.*, 282 Pa. 224, 127 Atl. 620 (1925) (same); also *Dunton v. Westchester Fire Ins. Co.*, 104 Me. 372, 71 Atl. 1037 (1908) (provision under standard policy per Rev. Stat. Maine c. 49).

30. *In re* Opinion of Justices, 97 Me. 590, 55 Atl. 828 (1903). Opinion related to Ch. 18, P. L. 1895.

It is reported in connection with the order of the State Senate requesting this opinion that the commissioners in Maine for the promotion of uniformity of legislation “had reported to the Governor that the statute in question was deemed to deprive insurers of the right of a jury trial upon the question of the extent of loss or damage arising under fire insurance policies; also that the constitutionality of the statute could well be questioned.”

standard insurance policy wherein it is mutually stipulated that the damages provided for shall be determined by arbitration. It may be urged, however, that this contract, the terms of which are prescribed by statute, is not voluntary, in that the individual is practically prevented from making contracts for the protection of his property by insurance, except such contracts as require him to waive his right of trial by jury; in that he is practically compelled to enter into that particular contract or go without insurance protection.

"But the broad question of the constitutional right of the individual to make and enforce contracts for the acquirement, possession and protection of property by insurance or otherwise free from legislative interference is not presented here. Whatever the extent of the constitutional right of the individual to make insurance contracts with other individuals, or unincorporated associations of individuals, we think it clear from the principles above stated that he has no constitutional right to make any particular insurance contract with a corporation. . . . The Legislature is not required by the Constitution to create corporations for individuals to make contracts with, nor is it prohibited from limiting or dissolving corporations with which individuals may wish to contract."³¹

5. *Same—A Minority View Denying the Power of Parties To An Insurance Policy to Make An Irrevocable Appraisal Provision—Cases and Statutes*

A. *Nebraska*

The Supreme Court of Nebraska has refused to accept the views of the courts in the American and British cases allowing parties to make a provision in an insurance policy to refer differences over loss and damage irrevocable by action. In considering this question of revocability the court would not concede any distinction between such provisions and provisions to arbitrate disputes generally which may arise between the parties in the future. It has taken most seriously the common law tradition against contracts ousting the courts of their jurisdiction, including its application to arbitration provisions.

31. The Justices were also of the opinion that the statute "does not offend against the fourteenth amendment to the Constitution of the United States, since it bears equally upon all fire insurance companies, domestic and foreign, without attempting any discriminations, and does not deprive any person of life, liberty, or property without due process of law."

The Supreme Court of Minnesota was of like mind with respect to its standard policy form and its irrevocable provision for appraisal of loss and damage. *Glidden Co. v. Retail Hardware Mut. Fire Ins. Co.*, 181 Minn. 518, 233 N.W. 310 (1930). The Supreme Court of the United States sustained this decision in *Hardware Dealers' Mut. Fire Ins. Co. v. Clidden Co.*, 284 U.S. 151 (1931). The views of the Justices of the Supreme Court of Maine were not mentioned by the courts in these cases.

The court examined and re-examined the question in 1902 in two cases, *Phoenix Ins. Co. v. Zlotky*, and *Hartford Fire Ins. Co. v. Hon.*³² Rehearings were denied in both cases.

In both cases the provision was drafted as a condition precedent to any action or suit to collect on the policy. In the *Zlotky* case the policy was reported as being in the "New York Standard Form." The court voiced its opinion in the *Zlotky* case as follows:

"Long after the announcement of the opinion in *Scott v. Avery*, the people of the State of Nebraska adopted a constitution containing a bill of rights, enumerated among which were that 'the right of trial by jury shall remain inviolate,' and that 'all courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due process of law.'" Also, that after the adoption of the constitution, this court had declared such an appraisal provision void, because it would, if honored, "oust the courts of their legitimate jurisdiction."³³ The court declared that it was not disposed to change this ruling "merely for the purpose of putting ourselves in closer touch with the house of lords [sic]."

The court also was convinced that: "There is no better reason for upholding a contract that in advance ousts the jurisdiction of a court of law from finding the amount of damage in a dispute between assured and insurer than there would be for upholding contracts ousting the jurisdiction of courts on any other question that might arise between them; and whenever we say that the jurisdiction of courts may be contracted away in advance on any question, we open a leak in the dyke of constitutional guarantees which might some day carry all away."

In a concurring opinion, Pound, C., was more pragmatic about the Nebraska rule. He observed:

"I do not think the constitutional provision with reference to trial by jury has any bearing upon the question involved in this case. The same provision is to be found in the constitution of the United States

32. *Phoenix Ins. Co. v. Zlotky*, 66 Neb. 584, 92 N.W. 736 (1902); *Hartford Fire Ins. Co. v. Hon.*, 66 Neb. 555, 92 N.W. 746 (1902).

33. The court cited *Schrandt v. Young*, 62 Neb. 254, 86 N.W. 1085 (1901); *Home Fire Ins. Co. v. Kennedy*, 47 Neb. 138, 66 N.W. 278 (1896); *Insurance Co. v. Bachelor*, 44 Neb. 549, 62 N.W. 911 (1895); *National Masonic Acc. Ass'n v. Burr*, 44 Neb. 256, 62 N.W. 466 (1895); *Home Fire Ins. Co. v. Bean*, 42 Neb. 537, 60 N.W. 907 (1894); *Union Ins. Co. v. Barwick*, 36 Neb. 223, 54 N.W. 519 (1893); *German-American Ins. Co. v. Etherton*, 25 Neb. 505, 41 N.W. 406 (1889).

A study of this group of cases permits a conclusion as to the establishment of the rule of revocability of provisions to refer loss and damage about the same as that declared by the court in the *Hon* case, namely, that the question "was more or less directly involved" in the cases. The further observation in the opinion that "the doctrine has been assumed to be firmly established in the body of our law" is without any supporting documentation.

It remains to note that none of the American cases ruling appraisal provisions to refer loss and damage irrevocable by action (*supra* note 1) is cited or discussed in the opinion of the court in the above Nebraska cases.

and in the constitutions of the several states. Notwithstanding these provisions and the jealousy with which the right of trial by jury is guarded by the federal courts, those courts and most of the state courts uphold the distinction between an agreement to arbitrate the whole matter in dispute and an agreement for arbitration of the amount of loss or damage only, as made in the case of *Scott v. Avery*. Were the question a new one, I do not believe this court would take the stand to which it is now committed."

"But," he continued, "every court, in the course of time, develops some peculiar doctrines with respect to which it differs from others of co-ordinate jurisdiction. Where these peculiar doctrines work no harm, certainty and consistency are no less important than agreement with other courts."

In conclusion said he: "The rule in question has been announced so many times³⁴ that it may be said to have entered into the contracts in force in this state, and is commonly understood by all persons to govern the agreements which they make. It is by no means a bad rule and I see no reason to believe that it operates unjustly."

In the *Hon* case the opinion of the court was of like tenor as that of the prevailing opinion in the *Zlotky* case. It concluded as follows:

"It seems clear to us that an agreement which deprives a party of a right to the protection of the courts upon a single question, which may be the question of greatest importance in the controversy, violates the principle involved to the same extent as would an agreement requiring all matters to be submitted. If we say that an agreement to submit one question to arbitrators is valid, then there is no middle ground upon which to stand. If one question can be submitted, and the determination of the arbitrators be final, then all questions involved can, upon the same principle, be submitted. The distinction made by the learned lords in *Scott v. Avery* does not rest upon sound principles."

While the court characterized an appraisal provision as "void," it seems probable that if the parties were to follow through with an appraisal thereunder, the award would be respected as in other cases.³⁵

In view of the court's reliance upon the foregoing provisions of the state constitution and the policy against contracts ousting the courts of their jurisdiction in ruling the appraisal provisions revocable, it remains

34. He had done so in *Schrandt v. Young*, *supra* note 33; and had cited *National Masonic Acc. Ass'n v. Burr*, *supra* note 33.

35. The validity of awards is generally assured although they are rendered under arbitration provisions which are declared to be against public policy and void as contracts to oust the courts of their jurisdiction. *Rueda v. Union P. R. Co.*, 180 Ore. 133, 175 P.2d 778 (1946) with note, 26 ORE. L. REV. 280 (1947). But see the rulings of the Supreme Court of Puerto Rico, *infra* note 65.

to be seen what the court will do with legislation enacting a standard form of policy with an irrevocable appraisal provision included therein. There was no such legislation at the time of the foregoing decisions. In 1913 the Legislature enacted an insurance code, provided an insurance board to administer it, and directed the board to prescribe the form of policy which was to be "as nearly as practicable in the form known as the New York standard."³⁶ In 1951³⁷ it was enacted that the only form of policy which may be used in the state "shall conform in all particulars as to blanks, size of type, context, *provisions, agreements and conditions.*" with the "1943 Standard Fire Insurance Policy of the State of New York."³⁸

If the Court were to continue with its views as advanced in the foregoing *Zlotky* and *Hon* cases, apparently it would rule, either that the appraisal provision is revocable in Nebraska, or, if irrevocable, that that part of the policy is unconstitutional. The latter would be most difficult in the face of the decision of the Supreme Court of the United States in *Hardware Dealers' Mutual Fire Ins. Co. v. Glidden Co.*,³⁹ and of the decisions sustaining the constitutionality of the more modern arbitration statutes making irrevocable and enforceable provisions in writing to arbitrate future disputes generally.⁴⁰ It would be equally difficult to rule out the appraisal provision as being contrary to public policy when the Legislature has vouched for it.⁴¹

B. *New Hampshire*

The Supreme Court of New Hampshire has ruled that the referee provision in the standard policy legislation of the state is *optional* with the insured and may be revoked like any other arbitration provision. The matter was first decided in 1900 in *Franklin v. New Hampshire Fire Ins. Co.*⁴² The court based its decision upon inferences which it drew from a part of the legislation which provided for the standard policy, rather than upon a determination that the provision did not adequately qualify as a

36. Sess. Laws 1913, c. 154; see *State v. Howard*, 96 Neb. 278, 147 N.W. 689 (1914).

37. NEB. REV. STAT. § 44-501 (Reissue of 1952) (1943).

38. For the appraisal provision in this policy, see *supra*, p. 22.

39. 284 U.S. 151 (1931) reported below. See also, Opinion of Justices, Supreme Court of Maine, 97 Me. 590, 55 Atl. 828 (1903) *supra*, p. 24.

40. *Matter of Berkovitz v. Arbib & Houlberg*, 230 N.Y. 261, 130 N.E. 288 (1921); *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1931).

41. See *Grady v. Home Fire & Marine Ins. Co.*, 27 R. I. 435, 63 Atl. 193 (1906), *supra* note 26.

42. 70 N.H. 251, 47 Atl. 91 (1900). The case was submitted on an agreed statement of facts. The parties went to appraisal, but before it was completed, the appraiser appointed by the insured withdrew and refused to participate further. Three days later the insured served notice upon the company's agents and upon the remaining two appraisers of refusal to proceed further with the proceeding and brought suit to collect on the policy. The insurer petitioned for court appointment of appraisers pursuant to the appraisal provision. *Held*, that the submission was effectively revoked by the notice as well as by the withdrawal of the insured's

condition precedent.⁴³ The provisions of the policy, including the appraisal (referee) provision, were composed by the Insurance Commissioner as had been directed in the legislation. Neither the policy as a whole nor the appraisal provision had been spelled out by the Legislature. The policy and its provisions as written by the Commissioner were, however, expressly adopted by the legislation.

The court explained the basis of its decision as follows:

"The contract, it is said, is not to pay the loss, but only to pay what three men shall say that the loss is. That is, since the adoption of this form of policy in 1885, every case in which the amount of loss has been litigated has been erroneously conducted; and in each case the only inquiry on this branch should have been, 'What is the sum fixed by arbitrators?' The contention is that the referee clause is of the very essence of the contract; *but beyond the policy is the statute which the policy is not allowed to contradict* (Pub. St. 170. § 18), *and which shows that the Legislature did not understand that the question of the amount of loss had been taken from the court.* Section 13, c. 170, Pub. St., provides that 'If upon trial the insured recovers more than the amount determined by the insurers, etc.' If the only contract made by the insurer was to pay the amount determined by arbitrators, this provision of the statute is meaningless; but if the statute means, as it must, that the amount of loss may be litigated, the referee clause cannot mean that an award of arbitrators is the only foundation for a suit." (Italics supplied.)

Pointing out further that "the adjustment here referred to is the amount which the insurer is willing to pay, or the sum it fixes as the amount of the loss," the court continued: "If he [the insured] may bring suit, he is not bound to abandon the action because of a stipulation in

appointee, and that the insured could maintain the action to collect on the policy without regard for the provision to refer. The company's petition for appointment of arbitrators was denied. To like effect see the opinion in *Marvas v. American Equitable Assur. Corp.*, 82 N.H. 533, 136 Atl. 364 (1927). See also, *Salganik v. United States Fire Ins. Co.*, 80 N.H. 450, 118 Atl. 815 (1922). Said the court in the *Marvas* case: "The parties are not compelled to adopt this procedure, and it is optional with the insured whether he will submit his claim to arbitration or bring an action at law to collect his damages under the fire insurance statute."

Search of the statutes has failed to reveal any subsequent legislative revision pertinent to these rulings. The standard policy legislation appears in the latest compilation of the New Hampshire statutes in c. 407, "The Fire Insurance Contract and Suits Thereon, REV. LAWS (1955)". This legislation dates back to 1885, Laws 1885, c. 93, amended in 1890 by Pub. St. c. 170, and the latter was the legislation involved in the *Franklin* case of 1900.

If the parties go forward with an appraisal of the amount of loss and damage and a valid award is returned, it is conclusive and binding on both parties as to the amount. *Salganik v. United States Fire Ins. Co.*, *supra*.

43. See the terms of the policy and appraisal provision as reported in the *Marvas* case, *supra* note 42. That a provision and its setting in a policy may plausibly be construed as optional—merely permissive—and, therefore, as not constituting the required condition precedent for irrevocability, see *Hansell v. Farmers' Mut. Hail Ins. Co. v. Wilson*, 45 Kan. 250, 25 Pac. 629 (1891).

the policy which conflicts with the statutory provision under which the suit was brought. The statute must prevail over the policy contract, for such was the legislative intent. "This chapter shall be a part of every contract of insurance. . . . No waiver of any part of it shall be set up by the insurer, and every stipulation in the contract in conflict with it shall be void." Id. § 18 The parties insured are entitled to a jury trial upon the question of the amount of their loss." (Italics supplied.)

It is difficult to be persuaded to the court's foregoing construction of Section 13 so as to render the appraisal provision revocable and unenforceable. The provision having legislative approval as a part of the standard policy form, it seems that it may reasonably be said that the Legislature intended that it would survive consistently with, rather than be in conflict with, another part (§ 13) of the same legislation. By ruling revocability by the process of statutory construction which the court used, it is to be concluded that the Legislature intended a useless role for the provision. This is true because, certainly, it did not require legislative approval of the provision in the policy in order to permit the parties mutually to agree upon the submission of differences and follow through with it to valid award.

The truth is, moreover, that the appraisal provision showed clearly that it contemplated not only that the parties might disagree as to the amount of loss and damage but it also provided for positive enforcement of the provision in such event. Such enforcement would bring an appraisal—in lieu of litigation.

By the terms of the provision, if the parties were unable, in event of difference over the amount of loss, to agree upon referees, "either party may, upon giving written notice to the other, apply to a justice of the supreme court, who shall appoint three referees . . . and their award in writing, after proper notice and hearing, shall be final, and binding on the parties." (Italics supplied.) This provision for enforcement of the referee provision by the Legislature certainly invited more endeavor to reconcile the provision with the foregoing Section 13, before ruling it out entirely as the court did.⁴⁴

It seems clear, moreover, upon taking into account the whole of Section 13 that such reconciliation was readily available. It does not seem to have been designed to render the appraisal provision revocable and non-enforceable. It appears, instead, to prescribe for judgments, executions and allowances of interest and costs when the insured, upon trial, (1) recovers more than the insurer offered, (2) recovers no more than the insurer offered. The full Section reads as follows:

44. For further consideration of this process of enforcing these appraisal provisions, see *infra* (next issue), *Enforcement of Appraisal Provisions*.

"If, upon trial, the insured recovers more than the amount determined by the insurers he shall have judgment and execution immediately therefor, with interest and costs. If he recovers no more than such amount the court may allow interest thereon, and such costs to either party as may be just; but execution shall not issue against the company within three months, unless by special order of court."

The tenor of this text seems not to indicate a purpose to rule out the appraisal process entirely or to render the provision revocable and non-enforceable. Section 13 would serve its purpose adequately if it were ruled to be applicable when and if the parties go to litigation as, for example, when neither party had invoked the referee provision, or when the company had waived or forfeited its rights to invoke it. Such construction also would have honored the apparent purpose of the provision to enable the insured as well as the company to enforce an appraisal rather than litigate.

C. Pennsylvania

Reference has been made previously to the common law decisions in Pennsylvania. They have denied traditional common law revocability of general arbitration provisions when the arbitrator is "named" therein; they have held revocable provisions which leave the arbitrator to be selected in the future. Apparently, provisions in insurance policies to refer differences over the amount of loss and damage have been judged likewise; unless the appraisers are "named" in the provision (and no such provision has been observed) it is revocable under the common law rulings.⁴⁵

A standard form of fire policy including the appraisal provision, like that of New York, is now spelled out in the statutes of the state.⁴⁶ This appraisal provision calls for appraisers to be selected in the future if the parties fail to agree upon the amount of loss or damage; it does not contemplate that the appraisers will be "named" therein. This legislation providing a standard form of policy with its appraisal provision dates back to 1915.⁴⁷ It was ruled in connection with the 1915 legislation that the appraisal provision continued to be revocable as at common law. While the legislature provided the form of policy with its appraisal provision, the supreme court declared: "Statutes are not presumed to make any change in the rules and principles of the common law or prior existing law beyond what is expressly declared in their provisions."⁴⁸ The context

45. See *supra* note 2.

46. 40 P.S. § 657.

47. P. L. 409 (1915).

48. *Gratz v. Insurance Co.*, 282 Pa. 224, 127 Atl. 620 (1925). Accord, *Chauvin v. Superior Fire Ins. Co.*, 283 Pa. 397, 129 Atl. 326 (1925).

and content of the current provision relating to appraisal are substantially identical with the 1915 legislation.⁴⁹

Miscellaneous Statutes: In a few American jurisdictions there are general statutory provisions which more or less explicitly touch the validity and revocability of appraisal provisions in fire insurance policies and other contracts.

D. Missouri

In Missouri a statute has been on the books since 1909 which declares that "any clause or provision providing for an adjustment by arbitration shall not preclude any party or beneficiary" from maintaining an action or suit on the contract.⁵⁰

After extended consideration of various matters which have been declared from time to time to set apart "appraisal" from "arbitration," a majority of the supreme court finally decided in 1920 that the statute does not apply to a provision in a fire insurance policy to refer differences over the amount of loss and damage. This statutory restriction upon a provision for "*adjustment by arbitration*" was said to contemplate "arbitration" in only its "technical" or "legal" sense, and, therefore, did not apply to the provision for "appraisal" of loss and damage.⁵¹

49. See 40 P.S. § 657.

50. The statute presently appears in Mo. ANN. STAT. c. 435, § 435.010 (Vernon 1949) "Arbitration." It was originally enacted (Laws of 1909, p. 347) as an amendatory addition to the Chapter of the Rev. Stats. of 1899 relating to contracts and promises generally. In the Rev. Stats. of 1909, however, the amendment was carried to the chapter on Arbitration, and it so appears in the present compilation of the Missouri Statutes.

51. *Dworkin v. Caledonian Ins. Co.*, 285 Mo. 342, 226 S.W. 846 (1920).

Two judges dissented on the grounds (1) that the majority view belied the intent of the legislature and (2) that this court already had determined the issue to the contrary in *Young v. Insurance Co.*, 269 Mo. 1, 187 S.W. 856 (1916). On the latter point see further, *Security Printing Co. v. Connecticut Fire Ins. Co.*, 209 Mo. App. 422, 240 S.W. 263 (1922).

In his article, *Arbitrations and Appraisals in the Missouri Courts*, 1954 WASH. U. L.Q. 49, 60, Professor Foster points out that the words "*an adjustment by arbitration*" as used in the 1909 Act were the very words which had been used in the opinion of the court in *Murphy v. Northern British & Mercantile Co.*, 61 Mo. App. 323 (1895), which (with the companion case of *McNees v. Southern Ins. Co.* in the same court in the same year), first ruled that the given provisions to refer loss and damage were irrevocable by action. The court, in the *Murphy* case found that the policy made it a condition precedent to the liability of the company to pay any loss or damage in case of difference as to the amount, "that there should have been *an adjustment by arbitration of the sum due plaintiff.*" (Italics supplied).

In *McManus v. Farmers' Mut. Hail Ins. Co.*, 239 Mo. App. 882, 203 S.W.2d 107 (1947), the by-laws of the insurer provided for the reference of differences over the amount of loss and damage. An agreement of submission, supplied by the insurer for the occasion, provided that the arbitrators were to determine whether or not it was (1) liable at all to this insured, and (2) if so, the amount of the loss. *Held*, distinguishing the *Dworkin* case, the provision (plus the submission agreement, it seems) was one for arbitration of the liability of the insurer as well as of the amount of loss and was, therefore, subject to the 1909 Act. The court also relied upon the point that the terms "appraisal" and "appraisers" were not used in the by-laws or submission; the words "arbitration and arbitrators are used throughout."

E. Idaho, Montana, North Dakota, Oklahoma, South Dakota

At least five states have a statutory provision applying to contracts generally which is substantially as follows:

"Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void."

These states are Idaho,⁵² Montana,⁵³ North Dakota,⁵⁴ Oklahoma,⁵⁵ and South Dakota.⁵⁶ The provision came into their statutes around 1900.

It seems a reasonable guess from the opinions of the courts in cases involving other issues that this statute will be held to preclude the parties to a fire insurance policy (or other insurance contract) from making a provision to refer differences over the amount of loss and damage effective as a condition precedent to suit to collect on the policy.⁵⁷

On the other hand, when a standard form of policy is prescribed by the legislature and a provision to refer differences over loss and damage is fully spelled out therein, it seems clear that such specific legislation should be held to displace the applicability of the foregoing general statutory provision to such appraisal provision.⁵⁸

A statutory provision aimed more precisely at provisions in insurance policies to refer differences over loss and damage has been found in Arkansas, Vermont and Puerto Rico.

52. IDAHO CODE ANN. § 29.100 "General Provisions Relating to Contracts."

53. MONT. REV. CODES ANN. § 13-806 "Unlawful Contracts" (1947).

54. N.D. REV. CODE § 9-0805 "Unlawful and Voidable Contracts" (1943).

55. OKLA. STAT. tit. 15, § 216 "Unlawful Contracts" (1951).

56. S.D. CODE § 10.0705 "Unlawful Contract Provisions" (1939).

57. IDAHO. See *Douville v. Pacific Coast Cas. Co.*, 25 Idaho 396, 138 Pac. 506 (1914). Consult also, *White v. Village of Soda Springs*, 46 Idaho 1953, 266 Pac. 795 (1928); *Huber v. St. Joseph's Hospital*, 11 Idaho 751, 83 Pac. 768 (1906).

MONT. See *Cacic v. Slovenska Narodna Podporna Jednota*, 102 Mont. 438, 59 P.2d 910 (1936). Compare, *Wortman v. Montana Cent. Ry.*, 22 Mont. 266, 56 Pac. 316 (1899).

OKLA. See *Merchants & Manufacturers Ins. Co.*, 205 Okla. 31, 234 P.2d 409 (1951); *Niagara Fire Ins. Co. v. Nichols*, 96 Okla. 96, 220 Pac. 920 (1923); *Seay v. Commercial Union Assur. Co.*, 42 Okla. 83, 140 Pac. 1164 (1914).

S.D. See *Phenix Ins. Co. v. Perkins*, 19 S.D. 59, 101 N.W. 1110 (1905). But see, *Scim v. Krause*, 13 S.D. 530, 83 N.W. 553 (1900).

58. Consult *Niagara Fire Ins. Co. v. Nichols*, *supra* note 57.

Legislation prescribing the New York standard policy form for exclusive use in the state and the spelling out of the terms and provisions thereof, including the appraisal provision under the heading "Requirements in case loss occurs" as reported *supra*, p. 22, is presently on the statute books of Oklahoma, OKLA. STAT. ANN. tit. 36, c. 4, "Fire Insurance," § 244.1, and of South Dakota, Supp. to S.D. CODE of 1939 tit. 31, c. 31.24, "Contents of Fire Policy," § 31.2401 (1952).

F. Arkansas

In Arkansas, the following provision, originally enacted in 1903,⁵⁹ reads as follows:

"No policy of insurance shall contain any condition, provision or agreement which shall directly or indirectly deprive the insured or beneficiary of the right to trial by jury on any question of fact arising under such policy, and all such provisions, conditions or agreements shall be void."⁶⁰

The Supreme Court has ruled, and repeated the ruling, that a provision in a fire insurance policy to refer differences over the amount of loss and damage is void under this statute; the insured may sue to collect on the policy without regard for the provision.⁶¹

G. Vermont

A provision long standing in the statutes of the state relating to insurance companies invalidates appraisal provisions in insurance policies as follows:

"A policy of fire, life, accident, liability or burglary insurance, or an indemnity, surety or fidelity contract or bond issued or delivered in this state by an insurance company doing business herein shall not contain . . . a condition or clause making an award by appraisers, fixing the amount of loss by the insured or beneficiary in such policy or contract, a condition precedent to bringing or maintaining an action on such policy or contract. Any such conditions or clauses shall be null and void."⁶²

No decision by the supreme court has been observed involving the application of this statute.⁶³

H. Puerto Rico

The pertinent statutory provision in Puerto Rico was enacted in 1921 and reads as follows:

"Any clause in an insurance contract depriving the insured of his right to claim in the courts of justice, at any time after the occurrence of the accident against which the insurance was made, the amount of any loss

59. ARK. STAT., Act of 1903, No. 111.

60. ARK. STAT. ANN. § 66-509 "Insurance Policies—Premiums—Actions" (1947).

61. Insurance Co. v. Kempner, 132 Ark. 215, 200 S.W. 986 (1918); Firemen's Ins. Co. v. Davis, 130 Ark. 576, 198 S.W. 127 (1917); See also, Papan v. Resolute Ins. Co., 219 Ark. 907, 245 S.W.2d 565 (1952) (policy covering damage to automobile). But compare, Miller v. American Ins. Co., 124 F. Supp. 160 (W.D. Ark. 1954) (issue as to effect of the statute upon a Texas fire policy covering personal property in Arkansas).

62. Vt. REV. STAT. § 9187 c. 387 "Insurance Companies" (1947).

63. A similar provision of early origin in the statutes of Iowa was repealed in 1947. A standard form of fire policy, including the appraisal provision, like that of New York was enacted at the same time. Acts 1947, c. 263, Code (Annotated) c. 515, "Insurance Other Than Life," § 515.138.

suffered and which has been the object of such insurance, shall be illegal. The court shall determine not only the liability of the company but also the amount of the loss."⁶⁴

The Supreme Court appears to have held that an appraisal provision in an insurance policy is so far "illegal" that even an award of appraisers duly rendered thereunder is void; the insured may sue on the policy and recover in disregard of the award.⁶⁵

6. Irrevocable Appraisal Provisions—How Invoked

A. Pleading and Proof

Given general validity and irrevocability for a provision in an insurance policy to refer differences over the amount of loss and damage to third persons to be selected by the parties, it remains to observe in some detail how the courts have made it work. In the cases first determining the irrevocability of the provision, issues as to burdens of pleading and proving it and as to performance thereunder were seldom raised. Frequently in those cases the insurer, as defendant in the insured's action to collect on the policy, pleaded the terms of the provision, the accrual of differences between the parties over the amount of loss and damage, its demand on the insured for appraisal pursuant to the provision and the insured's refusal. All of this was pleaded to defeat the action. Frequently the insured demurred to this answer, thereby putting in issue the enforceability (irrevocability) of the provision.⁶⁶

It remained for other cases to deal more precisely with the make-up of the provision and these matters of pleading and proof.

There is near the consensus among these cases that, although a provision qualifies on the issue of irrevocability as a "condition precedent" to the insured's "right of action," it is, notwithstanding, conditional upon the insurer duly demanding the appraisal; the demand becomes a condition precedent to the making of the condition precedent. A minority has refused to join in this view.

The results in both groups of cases have been derived by construing the terms of the provision. In nearly all of these cases the courts have given most of their attention to the presence or absence of one or more of the following clauses in the provision, namely, (1) that there shall be

64. Act No. 66, July 16, 1921, § 175.

65. *Parga & Frontera v. Royal Ins. Co.*, 32 P.R. 73 (1923). See further, *George L. Squire Mfg. Co. v. National Fire Ins. Co.*, 4 F. Supp. 137 (W.D.N.Y. 1933); *Rodriguez v. U.S. Fire Ins. Co.*, 34 P.R. 370 (1925). Compare *supra* note 35 and *Salganik v. United States Fire Ins. Co.*, *supra* note 42.

66. See, for example, *Scott v. Avery*, *supra* p. 9. Or, the plaintiff might put the defendant to trial on the truth of its answer and to his claim of non-suit or of a directed verdict. See, for example, *Hamilton v. Liverpool & London & Globe Ins. Co.*, *supra* note 1.

an appraisal "at the written request (or demand) of either party," (2) that the loss shall not become payable until a stated time after proof of loss, etc. "including an award by appraisers when the appraisal has been required," (3) that no action shall lie "until after award."

The foregoing near-consensus of the decisions obtains when all three of the foregoing clauses are present, when clauses (1) and (2) are present and, indeed, when clause (1) alone is present. And it is quite clear that when clause (1) alone is present little attention has been paid to the presence or absence of (2) or (3). The minority rulings appear chiefly when clause (1) is absent.⁶⁷

67. (A) When the provision calls for appraisal of differences as to the amount of loss and damage "at the written request [or demand] of either party" the courts are in accord that the insurer must duly make the request or demand.

U.S. *Wallace v. German-American Ins. Co.*, 2 Fed. 658 (C.C.D.Iowa 1880), *motion for new trial overruled*, 41 Fed. 742 (1882). In the second decision of this case the court observed as follows:

The condition did not absolutely require an arbitration; it only authorized either party to require it by a request in writing. The inference is reasonable that, if neither party requested it in writing, the usual remedies by suit were to remain. It may reasonably be inferred that the parties had in view the possibility that in some cases both would prefer a suit in a court of justice to an arbitration, and therefore left it optional with either party to request in writing an arbitration; intending that, if both declined to make such request, legal proceedings might be resorted to. If this was not the intention of the parties, it is difficult to understand what purpose they had in view in using the words, 'at the written request of either party.' If it was their purpose to require that, in every case the damages should be ascertained by arbitration, they could have said so in plain terms.

And as for the further clause of the provision that no suit to recover any loss "shall be sustained until after an award shall have been obtained, fixing the amount of such claim in the manner above provided," the court commented:

If this provision stood alone, it might well be claimed that, in the absence of an arbitration and award, no suit could be maintained; but it refers to the prior condition respecting arbitration, and the two must be read together. So read, there is ground for holding that the two provisions together authorize either party to demand an arbitration, but do not absolutely require either to do so; and that, where either does demand such arbitration, no suit can be maintained until after the amount of damages shall have been in that matter ascertained.

See also, *Harrison v. German-American Fire Ins. Co.*, 67 Fed. 577 (C.C.S.D. Iowa 1895).

CAL. *Winchester v. North British & Mercantile Ins. Co.*, 160 Cal. 1, 116 Pac. 63 (1911); See further, *Case v. Manufacturers Fire & Marine Ins. Co.*, 82 Cal. 266, 21 Pac. 843, *Rehearing Aff'd* 22 Pac. 1083 (1889).

ILL. *German-American Ins. Co. v. Steiger*, 109 Ill. 254 (1884).

IOWA. *Davis v. Anchor Mut. Fire Ins. Co.*, 96 Iowa 70, 64 N.W. 687 (1895); *Gere v. Council Bluffs Ins. Co.*, 67 Iowa 272, 23 N.W. 137, *rehearing aff'd* 25 N.W. 159 (1885). In the former case the court observed as follows:

If we eliminate the words, "at the written request of either party," we have, in terms, a provision for arbitration as a condition precedent to a right of action. If we restore the words, the provision is so modified that the arbitration is only to be had on request. Until there is a written request, neither party is compelled to arbitrate. Appellant's [the insurer's] construction is that plaintiff [the insured] must request arbitration, and then, if he desires, defendant may waive it. That would be the same as if the policy provided that such differences should be arbitrated unless defendant waived the right. The language of the policy cannot be tortured into such a meaning. When a difference arises it gives either party a right to enforce arbitration by requesting it. If neither requests it, the provision for arbitration is not made

operative in that particular case. Importance is attached to section 10, because of its language,—that no action shall be maintained until the award provided for in the preceding section shall have been obtained. That language means no more than this: That when arbitration, provided for in section 9, is invoked, as by its terms provided, no action can be maintained until the award is had. Section 10 merely saves to the party desiring it the right to the award under section 9; but, if he desires it, he must take the steps agreed upon to obtain it.

KAN. Walker v. German Ins. Co., 51 Kan. 725, 33 Pac. 597 (1893).

MICH. Nurney v. Firemen's Fund Ins. Co., 63 Mich. 633, 30 N.W. 350 (1886).

Consult also, Blake v. Farmers' Mut. Lightning Protected Fire Ins. Co., 194 Mich. 589, 161 N.W. 890 (1917).

MO. Probst v. American Ins. Co., 64 Mo. App. 408 (1896). See also, Hawkinson Tread Tire Co. v. Indiana Lumbermen's M. & I. Co., 362 Mo. 823, 245 S.W.2d 24 (1951) (policy covered "use and occupation" loss, which was at issue in this litigation).

MONT. Randall v. American Fire Ins. Co., 10 Mont. 340, 25 Pac. 953 (1891).

N.Y. See Gibbs v. Continental Ins. Co., 13 Hun. 611 (N.Y. 1878).

OHIO. Fire Ass'n v. Agresta, 115 Ohio St. 426, 154 N.E. 723 (1926). The Court distinguished the earlier Ohio decisions in *Phoenix Ins. Co. v. Carnahan* and *Graham v. German Ins. Co.* (cited below in (B) of this note) on the ground that in the policies involved in those cases "there was an unqualified requirement that the amount of the loss in the event of disagreement, be ascertained by appraisal." In the present case, on the other hand, appraisal was made optional upon the "written request of either party." Compare *Madison v. Caledonian-American Ins. Co.*, 43 N.E.2d 245 (Ohio App. 1940).

PA. See Wright v. Susquehanna Mut. Fire Ins. Co., 110 Pa. 29, 20 Atl. 716 (1885). The position of the court on the point at hand was of little consequence because of the general view as it seems to be in Pennsylvania Courts, namely, that appraisal provisions are revocable unless they "name" the appraiser. See note 2 *supra*.

WIS. See *Phoenix Ins. Co. v. Badger*, 53 Wis. 283, 10 N.W. 504 (1881).

(B) In cases involving an appraisal provision which *did not* contain (1), the clause "at the written request [or "demand"] of either party," but did contain (2) providing that the loss should not become payable until a stated time (usually sixty days) after proof of loss etc., "including an award by appraisers when the appraisal has been required" the decisions are not in accord. But a majority have held, in line with the above cases, that the insurer must call for appraisal and that the last quoted clause implies the requirement of demand by the insurer.

COLO. Norwich Union Fire Ins. Co. v. Rayor, 70 Colo. 290, 201 Pac. 50 (1921).

GA. Atlas Assur. Co. v. Williams, 158 Ga. 421, 123 S.E. 697 (1924); *Goldberg v. Provident Washington Ins. Co.*, 144 Ga. 783, 87 S. E. 1077 (1916).

ILL. Concordia Ins. Co. v. Bowen, 121 Ill. App. 35 (1905); but see *contra*, *Phoenix Ins. Co. v. Norton & Co.*, 109 Ill. App. 63 (1902).

IOWA. Lesure Lumber Co. v. Mutual Fire Ins. Co., 101 Iowa 514, 70 N.W. 761 (1897).

KAN. Amusement Syndicate Co. v. Prussian Nat'l Ins. Co., 85 Kan. 367, 116 Pac. 620 (1911).

KY. See *Continental Ins. Co. v. Vallandigham & Gentry*, 116 Ky. 287, 76 S.W. 22 (1903).

MICH. National Home Bldg. & L. Ass'n v. Dwelling House Ins. Co., 106 Mich. 236, 64 N.W. 21 (1895).

N.Y. See *Chainless Cycle Mfg. Co. v. Security Ins. Co.*, 169 N.Y. 304, 62 N.E. 392 (1901).

OKLA. Rochester German Ins. Co. v. Rodenhouse, 36 Okla. 378, 128 Pac. 508 (1912); *American Ins. Co. v. Rodenhouse*, 36 Okla. 211, 128 Pac. 502 (1912).

TEX. Virginia F. & M. Ins. Co. v. Cannon, 18 Tex. Civ. App. 588, 45 S.W. 945 (1898).

WASH. Goldstein v. National Fire Ins. Co., 106 Wash. 346, 180 Pac. 409 (1919); *Davis v. Atlas Assur. Co.*, 16 Wash. 232, 47 Pac. 436 (1896).

Contra. The Supreme Court of Ohio championed the minority view in 1907 as follows:

Now, could a condition precedent be more express than this? In case of difference or disagreement the 'ascertainment' of the amount for which the insurer shall be liable 'shall be made' by appraisers, and the amount 'having been thus determined,' the same, not some other sum, shall be payable 'sixty

days after due notice, ascertainment and satisfactory proofs of loss have been received by the insurer in accordance with the terms of the policy,' not in accordance with demand or request of the insurer. Beyond all reasonable dispute, this is an agreement to pay only after an award. But this is not all of the contract on this subject.

The additional part of the contract to which the court referred was that providing that a loss should not become payable until 60 days "after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, *including an award by appraisers when appraisal has been required.*" (Italics supplied)

"It is true" said the court,

. . . that the word 'required' may mean 'requested' or 'demanded'; but it may also mean 'made necessary' or 'made an essential condition,' and the word 'requirements,' as used in these policies, may mean 'essential conditions' or 'things made necessary' (see Century Dictionary), and that meaning should be adopted which would seem to be most in harmony with the other language of the contract. This phrase 'when appraisal is required' is so strikingly different from the policies in reported cases which expressly provide for appraisal upon 'the written request of either party,' or 'when appraisal has been permitted,' that we may assume that it was intended to avoid the construction placed on such policies, and when we consider the painstaking care with which the obtaining of an award is defined as a precedent condition, all through the contract, we are not at liberty to adopt a meaning for this one word 'required' and the word 'requirements' which would destroy the effect of everything else that is written in the contract on this subject and entirely reverse its meaning.

Graham v. German-American Ins. Co., 75 Ohio St. 374, 79 N.E. 930 (1907). See also Phoenix Ins. Co. v. Carnahan, 63 Ohio St. 258, 58 N.W. 805 (1900). Also Madison v. Caledonian-American Ins. Co., 43 N.E.2d 235 (Ohio App. 1940).

Accord. MINN. Mosness v. German-American Ins. Co., 50 Minn. 341, 52 N.W. 932 (1892).

Mo. McNees v. Southern Ins. Co., 69 Mo. App. 232 (1897); Murphy v. Northern British & Mercantile Co., 61 Mo. App. 323 (1895).

See also, Southern Mut. Ins. Co. v. Turnley, 100 Ga. 296, 27 S.E. 975 (1897); but consult Atlas Assur. Co. v. Williams, 158 Ga. 421, 123 S.E. 697 (1924).

In the following Missouri case, it likewise was ruled that the insured must offer and seek arbitration before suit. But the report of the case does not disclose any of the above clauses (1), (2) or (3) in the provision as set forth. Lance v. Royal Ins. Co., 259 S.W. 535 (Mo. App. 1924).

(C) In a few cases apparently the appraisal provision contained neither (1), the clause, "at the written request [or "demand"] of either party," nor (2), the clause, "*including an award by appraisers when the appraisal has been required,*" but did have (3), the clause that no action will lie "*until after an award.*"

In Kahnweiler v. Phenix Ins. Co., 67 Fed. 483 (8th Cir. 1895), it was ruled that the insurer must duly ask for appraisal if it wants it; that the insured can sue to collect without first offering or seeking it. The court stated its position as follows:

When there is a difference between the company and the insured as to the amount of the loss the policy declares: "The same shall then be submitted to competent and impartial arbitrators, one to be selected by each party . . ." It will be observed that the obligation to procure or demand an arbitration is not by this clause, in terms imposed on either party. It is not said that either the company or the insured shall take the initiative in setting the arbitration on foot. The company has no more right to say the insured must do it than the insured has to say the company must do it. The contract in this respect is neither unilateral nor self-executing. . . . The clause is to be construed the same as if it read "upon the request of either party."

See also, Gauche v. London & Lancashire Ins. Co., 10 Fed. 347 (C.C.E.D.La. 1881).

Contra.

GA. See Southern Mut. Ins. Co. v. Turnley, 100 Ga. 296, 27 S.E. 975 (1897).

ILL. Phenix Ins. Co. v. Stocks, 149 Ill. 319, 36 N.E. 408 (1893).

MASS. See Lamson Consol. Store Service Co. v. Prudential Fire Ins. Co., 171 Mass. 433, 50 N.E. 943 (1898) (provision in standard policy form per STAT. 1887, c. 214, § 60); insured must plead performance or excuse for non-performance, but his failure to do so must be taken by demurrer; the defect in such case can be

Both clause (1) and a combination of parts of (2) and (3) are in the provision in the New York Standard Form.⁶⁸

According to the prevailing view, it is adequate for the insured to plead generally his performance of the terms and conditions of the policy required of him. General principles of code pleading and probably of modern common law practice,⁶⁹ or special statutory provisions relating to pleadings by the insured in an action to collect on an insurance policy,⁷⁰ facilitate the plaintiff's pleadings in this respect.

Then, it is up to the insurer to plead the provision, accrual of disagreement over the amount of the loss, its request to the insured for appraisal pursuant to the provision, and the insured's neglect or refusal, and to do so by answer (a "separate defense") pointing out these matters.⁷¹

In short, under the majority view, while the appraisal provision may be adequately drafted so as to qualify as a "condition precedent" to the insured's "right of action" and be made irrevocable by action, it affords only an optional and defensive right to the insurer. In this respect the provision alone is not the factor which conditions the plaintiff's "right of action" to

amended. See also *Molea v. Aetna Ins. Co.*, 326 Mass. 542, 95 N.E.2d 749 (1950) setting forth that under the provision in the standard form per MASS. GEN. LAWS c. 175, the insured is required to make demand for the appraisal.

MICH. *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116, 44 N.W. 1055 (1890).

The decisions in the following cases required the insurer to call for arbitration; the insured was not required to do so before initiating suit on the policy. It does not appear that the appraisal provisions included (1), the "request" clause, or (2), the clause, "including an award by appraisers when the appraisal has been required." Clause (3) that no action will lie "until after an award" appeared more or less distinctly in some of them, but seems not to have been relied upon as of controlling significance.

KY. *Sun Mut. Ins. Co. v. Crist*, 19 Ky. L. Rep. 305, 39 S.W. 837 (1897).

MISS. *Sykes v. Royalty Cas. Co.*, 111 Miss. 746, 72 So. 147 (1916). See also *Mississippi Fire Ins. Co. v. Dixon*, 133 Miss. 570, 98 So. 101 (1923).

N.Y. See *Edwards v. Maryland Motor Car Ins. Co.*, 204 App. Div. 174, 197 N.Y. Supp. 460 (1922) (theft policy on automobile).

S.D. *Botte & Jansen v. Equitable Fire Ass'n*, 23 S.D. 240, 121 N.W. 773 (1909); *Nerger v. Equitable Fire Ass'n*, 20 S.D. 419, 107 N.W. 531 (1906); *Norris v. Equitable Fire Ass'n*, 19 S.D. 114, 102 N.W. 306 (1905).

VA. *Tilley v. Continental Fire Ins. Co.*, 86 Va. 811, 11 S.E. 120 (1890).

WIS. See *Vangindertaelen v. Phenix Ins. Co.*, 82 Wis. 112, 51 N.W. 1122 (1892).

68. See *supra*, p. 21.

69. *U.S. Kahnweiler v. Phenix Ins. Co.* *supra* note 67 (C).

ILL. *Concordia Fire Ins. Co. v. Bowen*, 121 Ill. App. 35 (1905).

IOWA. See *Smith v. Continental Ins. Co.*, 108 Iowa 382, 72 N.W. 126 (1899).

MINN. See *Kelly v. Liverpool Ins. Co.*, 94 Minn. 141, 102 N.W. 380 (1905).

UTAH. See *Stephens v. Union Assur. Co.*, 16 Utah 22, 50 Pac. 626 (1897).

WIS. See *Vangindertaelen v. Phenix Ins. Co.*, 82 Wis. 112, 51 N.W. 1122 (1892).

Even if the provision were a "condition precedent" of more common kind, the general pleading would be sustained under modern code provisions. See CLARK, CODE PLEADING 280 (1947).

70. Such provisions were enacted at an early date in some jurisdictions to permit such general pleading, the policy, or copy thereof, being filed with the declaration or complaint. See *Tilley v. Connecticut Fire Ins. Co.*, 86 Va. 811, 11 S.E. 120 (1890); compare *Southern Mut. Ins. Co. v. Turnley*, 100 Ga. 296, 27 S.E. 975 (1897).

71. *U.S. Kahnweiler v. Phenix Ins. Co.*, *supra* note 67 (C). *Phoenix Fire Assur. Co. v. Murray*, 187 Fed. 809 (3rd Cir. 1911).

collect on the policy. If the insurer desires appraisal, it must duly demand it and plead and prove that it duly demanded it. And, as appears below, it also must be prepared to persuade the jury against any claims brought forward by the insured that it has "waived" its rights under the provision.

There is confusion in the cases as to the identity of the plea by the insurer claiming appraisal under the appraisal provision. Sometimes it is regarded as being in abatement; sometimes as being in bar.⁷² The insured's action to collect on the policy is put at stake by the plea but only to postpone it pending the appraisal. The provision is drafted and integrated with the insurer's undertaking to pay to this end. If the award is no loss, the insured will collect nothing. But if the award is for an amount, the insured may or may not collect. The insurer's liability to pay is not within the purview of an appraisal and award. In short, the plea of the provision, leaving, as it does, these further considerations as to the insured's right of action to collect on the policy, seems to be, within traditional meanings of the terms, more dilatory than in bar of anything.

The dilatory nature and function of the plea and the nature of judgment thereon are concisely set forth in the early case of *Kahnweiler v. Phenix Ins. Co.*,⁷³ as follows:

"Moreover, if the plaintiffs failed to show compliance with the alleged condition precedent, their cause of action was not thereby barred or extinguished; at most it could only operate to suspend the cause of action and abate the suit. Clark, Cont. 666, 667. In the language of the policy, it would simply operate to abate the suit 'until after an award shall have been obtained.' In other words, when properly pleaded, it is a dilatory defense, and not one going to the merits of the action. It does not impugn the right of action altogether, and is not, therefore, a peremptory plea. . . .

CAL. *Jacobs v. Farmers Mut. Fire Ins. Co.*, 5 Cal. App.2d 1, 41 P.2d 960 (1935).

ILL. *Maltby v. Empire Auto Ins. Ass'n*, 239 Ill. App. 532 (1926); *Concordia Fire Ins. Co. v. Bowen*, *supra* note 69.

IOWA. *Smith v. Continental Ins. Co.*, *supra* note 69.

KY. See *Sun Mut. Ins. Co. v. Crist*, *supra* note 67 (C).

MINN. *Kelly v. Liverpool Ins. Co.*, *supra* note 69.

OKLA. *Consult American Ins. Co. v. Rodenhouse*, 36 Okla. 211, 128 Pac. 502 (1912).

S.D. *Nerger v. Equitable Fire Ass'n*, 20 S.D. 419, 107 N.W. 531 (1906).

WASH. See *Davis v. Atlas Assur. Co.*, 16 Wash. 232, 47 Pac. 436 (1896).

Wis. *Vangindertaelen v. Phenix Ins. Co.*, *supra* note 69.

The Supreme Court of Florida appears to require, in addition to the demand for appraisal, an admission by the insurer of some liability on the policy in order to qualify its demand for appraisal. This is because "the law does not require the insured to submit to a purely speculative appraisal of damages as to which it may be contended no liability at all exists." *New Amsterdam Cas. Co. v. Blackshear*, 116 Fla. 289, 156 So. 695 (1934).

The effect of the insurer's "denial of liability" upon the appraisal provision is considered below.

72. For a remarkable (and dubious) refinement as to when the plea is in bar and when it is in abatement as undertaken by the Supreme Court of Alabama, see *McCullough v. Mill Owners' Mut. Fire Ins. Co.*, 243 Ala. 67, 8 So.2d 404 (1942); *Maryland Cas. Co. v. Mayfield*, 225 Ala. 449, 143 So. 465 (1932).

73. 67 Fed. 483 (8th Cir. 1895), also reported *supra* note 67 (C).

"If this dilatory defense had been properly pleaded, and the issue had been rightfully found for the defendant, the judgment in the case would still be erroneous. [The judgment was "that the plaintiffs take nothing by their action, and that the said defendant go hence without day."] Mr. Stephens (Steph. Pl. 107) says that, upon the determination of an issue 'on a dilatory plea, the judgment is that the writ (or declaration) be quashed, upon such pleas as are in abatement of the writ or bill, and that the suit do stay or be respited until, etc., upon such pleas as are in suspension only,—the effect, in the first case, of course, being that the suit is defeated, but with liberty to the plaintiff to begin another in more correct form; in the second, that the suit is suspended until the objection is removed. If the issue arise upon a declaration or peremptory plea, the judgment is in general, that the plaintiff take nothing, etc., and that the defendant go thereof without day, etc., which is called a judgment of nil capiat.' The court below rendered a judgment of nil capiat in this case, which would forever preclude the plaintiffs from obtaining an award or recovering on the policy in suit after they had obtained an award. *The judgment should have been that the action abate 'until after an award shall have been obtained fixing the amount of the plaintiffs' claim as provided by the policy.'*"⁷⁴ (Italics supplied.)

Further evaluation of the purpose of the plea of the provision will identify it as being designed to stay the trial of the insured's action to collect anything on the policy pending appraisal quite like the stay of trial sought by the motion for stay of trial pending arbitration under the more modern arbitration statutes.⁷⁵ The plea is readily distinguished from the traditional pleas in abatement⁷⁶ in that, among other matters, the stay accomplishes in a substantial particular the enforcement of the appraisal provision.

The *plea for stay of trial* may well claim recognition in the terminology of common law pleading as a *Plea in Suspension*—a plea in the nature of a

74. See also, *Gauche v. London & Lancashire Ins. Co.*, 10 Fed. 347 (C.C.E.D. La. 1881); *Concordian Fire Ins. Co. v. Bowen*, 121 Ill. App. 35 (1905); *Aetna Ins. Co. v. Cowan*, 111 Miss. 453, 71 S.W. 746 (1916); *McNees v. Phoenix Ins. Co.* 69 Mo. App. 232 (1897); CLARK, CODE PLEADING 601-603 (1947).

75. Concerning such motions and proceedings thereon see, for example, the New York arbitration statute, Article 84, N.Y. CIV. PRAC. ACT § 1451; the United States Arbitration Act, 9 U.S.C. § 3 (1952).

See also the amended answer of the appellant in *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2nd Cir. 1942), which the court translated into an application under § 3 of the United States Arbitration Act. for stay of trial of the action pending arbitration. (Compare the unfortunate process involved in *Litrell v. Allemania Fire Ins. Co.*, 224 App. Div. 523, 231 N.Y.Supp. 520 (1928) as reversed in 250 N.Y. 628, 166 N.E. 350 (1929).

That the plea of the provision came to be effective under the British Common Law Procedure Act of 1854 and the Arbitration Act of 1889 to stay trial pending appraisal, see *Lord Campbell*, *supra* note 17, and *Tramor v. The Phoenix Fire Assur. Co.*, *supra* note 16.

76. These are pleas going to jurisdiction, capacity and joinder of parties, joinder of causes of action, and pendency of another action upon the same matter. See CLARK, CODE PLEADING 601 (1947).

plea in abatement. It does not seek "to abate or defeat the writ or action, but is merely to suspend it."⁷⁷

"A *plea in suspension* of the action is one which shows some ground for not proceeding in the suit at the present period, and prays that the pleading may be stayed until that ground be removed."⁷⁸

Under the minority rulings, the insured may, it seems, allege his performance of the provision in general terms—*i.e.* his offer of appraisal and the defendant's refusal. But he must prove his offer or establish some excuse for not complying with the provision. That excuse generally will rest in some matter of "waiver" by the insurer of its right to appraisal.⁷⁹

In these two groups of cases may be observed the beginnings of the judicial crusade to protect the insured against the irrevocable appraisal provision.⁸⁰ The courts have taken seriously in these cases the unilateral making of the insurance contract; almost all of them have recurrently urged that the appraisal provision is designed primarily for the benefit and protection of the insurer; and often have they declared it to be proper public policy that "doubts over the interpretation" of provisions in the policy having post-loss application, like the appraisal provision, should be resolved in favor of the insured and against the insurer that wrote them. And "doubts over the interpretation" have not come hard.

The opinion of the court in the early case of *Wallace v. German-American Ins. Co.*⁸¹ is thought to be fairly typical of the judicial attitude of the American courts in making up their "interpretations" of these provisions in connection with the plea of them by the insurer.

The provision carried the clauses "*at the written request*" and no action "*until after an award.*" The court observed:

"By a liberal construction of the above quoted provisions of the policy, it might be held that the insured was bound, as a condition precedent to the right to sue for his loss, to request the insurer in writing to enter into an arbitration; but it cannot be said that, strictly construed, the language

77. SHIPMAN, COMMON LAW PLEADING 400 (3rd ed. 1923).

78. STEPHEN, PLEADING 84 (1882); see also quotation from *Stephen* in the opinion in the *Kahnweiler* case as quoted *supra* p. 41.

79. See *Southern Mut. Ins. Co. v. Turnley*, 100 Ga. 296, 27 S.E. 975 (1897); *Molea v. Aetna Ins. Co.*, 326 Mass. 542, 95 N.E.2d 749 (1950); *Lamson Co. v. Prudential Fire Ins. Co.*, 171 Mass. 433, 50 N.E. 943 (1898) (provision in standard policy form per St. 1887); *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116, 44 N.W. 1055 (1890); *Mosness v. German-American Ins. Co.*, 50 Minn. 341, 52 N.W. 932 (1892); *McNees v. Southern Ins. Co.*, 69 Mo. App. 232 (1897). Compare *Kelly v. Liverpool Ins. Co.*, 94 Minn. 141, 102 N.W. 380 (1905); *Madison v. Caledonian-American Ins. Co.*, 43 N.E.2d 245 (Ohio App. 1940). Consult also *Garretson v. Merchants' & Bankers' Fire Ins. Co.*, 114 Iowa 17, 86 N.W. 32 (1901).

80. This crusade and its consequences are critically examined in the next succeeding sections of this article. Attention also will be called to the frustration of the provision even with respect to the stay of trial as to the question of the amount of loss and damage.

81. 41 Fed. 742 (C.C.N.D. Iowa 1882); also quoted above, note 67 (A).

must necessarily have this meaning. . . . There is force in the suggestion that the language of the contract did not impose the duty of requesting an arbitration upon one party more than upon the other. The language employed might well have induced the belief on the part of the plaintiff that the duty of requesting an arbitration rested upon the defendant if it desired to enforce the provision, or to set it up as a bar to this action. The condition did not absolutely require an arbitration; it only authorized either party to require it by a request in writing. The inference is reasonable, that if neither party requested it in writing, the usual remedies by suit were to remain. . . . *If the language employed in the policy leaves the question in doubt, the construction placed upon it, and acted upon by the assured, is to be upheld. A contract drawn by one party, who makes his own terms and imposes his own conditions, will not be tolerated as a snare to the unwary; and if the words employed, of themselves, or in connection with other language used in the instrument, or in reference to the subject matter to which they relate, are susceptible of the interpretation given them by the assured, although in fact intended otherwise by the insurer, the policy will be construed in favor of the assured.* As the insurance company prepares the contract, and embodies in it such conditions as it deems proper, it is in duty bound to use language so plain and clear that the insured cannot mistake or be misled as to the burdens and duties thereby imposed upon him."⁸² (Italics supplied.)

B. When Duty Demanded

When the insurer is required to make the demand for appraisal in order to qualify its plea of the provision, the insured may challenge the adequacy of the alleged demand and bring the matter to trial in the course of his action to collect on the policy. If this challenge fails, the plea prevails; if the challenge prevails, the plea fails.

82. The proposition that the provision is for the benefit of the insurer (rather than, or more than, of the insured) is best based on the fact that the insurer can invoke it and thereby, indirectly, but in a very real sense, enforce it, while the insured can do no more in most jurisdictions than ask the insurer to go forward with an appraisal. If the insurer refuses or does not respond, the insured generally has no other recourse than to sue to collect what he claims. (In so far as the thought back of the proposition may have been that appraisal, as a method of settling the amount of loss, is more beneficial to the insurer than to the insured, it must be doubted.)

It would have been more consistent with the intent of the appraisal provision if more enforcement of it had been provided in behalf of insured and insurer alike. See below, *Enforcement of Appraisal Provisions*.

It may be noted that the solicitude for the insured as voiced in the foregoing early cases, related to provisions in policies antedating the statutory standard form. The point about the unilateral making of the insurance contract by the insurer is less plausible with respect to the standard form because the Legislature has written it. But emphasis upon the one-sided service of the appraisal provision—in favor of the insurer—still is plausible because of want of legislative or other remedies for general enforcement of the provision in behalf of insured and insurer alike.

When the insured is required to make the demand, the insurer, upon pleading the provision against the insured's action to collect on the policy, may challenge the validity of any demand which the insured may claim he made, and put him to trial of the matter in that action. If the insurer's challenge fails so that the case stands with a good demand by the insured and refusal or neglect by the insurer to respond, its plea of the provision fails; if the challenge is sustained, the plea of the provision prevails.

When the insured is required to make the demand, he may, in lieu of making or purporting to make any demand, rely upon an "excuse" for not complying with the condition. Generally his "excuse" will involve some claim to "waiver" of the appraisal provision by the insurer as deduced from some action by the insurer relating to the settlement of the insured's claim on the policy.⁸³ And, as appears in subsequent sections of this article, even though the insurer shall have duly demanded appraisal, its demand may prove in vain because of the commission (imputation to it) of one or more instances of "waiver."

Accordingly, in the insured's action to collect on the policy any of the following matters—collateral to the purpose of the action—are always a potential issue and ordinarily involve trial by jury, namely, (1) whether or not the insurer's demand for appraisal was adequate and timely if the insurer is required to make demand; (2) whether or not the insured's demand was adequate and timely if the insured is required to make it; and (3) whether or not the insurer committed any other "excuse" or "waiver" of its rights under the appraisal provision.

In view of the more prevalent rule that the insurer must make the demand, most of the litigation embracing the general question as to whether or not appraisal was duly demanded has centered upon the validity of the insurer's demand. Accordingly, except as otherwise indicated, the following text concerns questions as to the validity of the insurer's demand.

While the text of the appraisal provisions currently prescribed in standard policy legislation varies from that of some of the provisions involved in the earlier cases with respect to the matters now under consideration, much the same questions appear to attend these later provisions as were raised in those cases. Thus, under the current appraisal provision of the New York Standard policy, appraisal may be initiated—"if the parties fail to agree"—by the "written demand of either" to select an appraiser.⁸⁴ In Maine appraisal may be initiated—if the parties "shall fail to agree"—by

83. See cases cited *supra* note 79. In *Molea v. Aetna Ins. Co.*, 326 Mass. 542, 95 N.E.2d 749 (1950) *supra* note 79, it is indicated that the burden of proof of the "waiver" in such cases rests upon the insured. But as in the proof of other instances of waiver of insurer's rights under the appraisal provision, the burden is sustained by "very slight evidence"—enough to support a verdict of waiver.

84. N.Y. INSURANCE LAW § 168; appraisal provision reprinted *supra* p. 22.

"written demand of either,"⁸⁵ and in Massachusetts,—*"if the parties fail to agree—," "the company shall, within ten days after receiving a written demand from the insured for the reference,"* take the prescribed steps to submit to referees.⁸⁶ In Minnesota appraisal may be initiated by either party *"upon a failure of the parties to agree,"* by notifying the other *"in writing that such party demands an appraisal."*

The Minnesota statute prescribes an over-all time limitation for initiation of appraisal, namely, that unless either party shall have so notified the other of its demand for appraisal *"within fifteen days after"* a statement of loss as prescribed in the statute shall have been rendered by the insured to the company, *"such right to an appraisal shall be waived."*⁸⁷

The adequacy of the insurer's demand may be put in issue by various challenges of its make-up. Thus, was it adequate in form;⁸⁸ did co-insurers join in the same demand;⁸⁹ did it extend to all or only part of the loss;⁹⁰

85. ME. REV. STATS c. 60, § 105 (Supp. 1955).

86. MASS. ANN. LAWS 5-A, c. 175, § 99, 100 (Supp. 1955). The Supreme Court has commented as follows:

Section 100 of c. 175 provides for the mechanics for such reference, and imposes on the insured the burden of making a written demand on the company for the reference of the amount of loss to three referees, if the parties fail to agree as to the amount of loss.

Mola v. Aetna Ins. Co., 326 Mass. 542, 95 N.E.2d 749 (1950).

87. MINN. STAT. ANN. § 65.01 (Supp. 1955). As is pointed out in a later section the Minnesota statute provides a little more enforcement for the appraisal provision than is provided in other standard policy legislation.

88. Where the appraisal provision calls for a written demand, a written demand it must be. *Probst v. American Ins. Co.*, 64 Mo. App. 408 (1896); *Walker v. German Ins. Co.*, 51 Kan. 725, 33 Pac. 597 (1893).

If *written* demand is not designated in the provision, apparently an oral one is legally adequate. But the insurer should realize the hazard of persuading the jury that its unwritten words constituted a demand for appraisal pursuant to the appraisal provision and that the insured so understood them. See *Palatine Ins. Co. v. Morton-Scott Robertson Co.*, 106 Tenn. 558, 61 S.W. 787 (1901); also *infra*, note 91.

In *Hamilton v. Liverpool & London & Globe Ins. Co.*, 136 U.S. 242 (1890), the Supreme Court indicated the role of the trial court, and, by implication, a limitation upon the role of the jury, in making up the legal construction of an alleged demand for appraisal, as follows:

Upon the evidence in this case, the question whether the defendant had duly requested, and the plaintiff had unreasonably refused, to submit to such an appraisal and award as the policy called for, did not depend in any degree on oral testimony or extrinsic facts, but wholly upon the construction of the correspondence in writing between the parties, presenting a pure question of law, to be decided by the court.

See also, *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 106 N.C. 28, 10 S.E. 1057 (1890). Compare *Madison v. Caledonian-American Ins. Co.*, 43 N.E.2d 245 (Ohio App. 1940).

89. Co-insurers may not join in a single demand for a joint appraisal, especially when there are variations in the provisions of their policies. *Connecticut Fire Ins. Co. v. Hamilton*, 59 Fed. 258 (6th Cir. 1893); *Dee & Sons v. Key City Fire Ins. Co.*, 104 Iowa 167, 73 N.W. 594 (1897); *Palatine Ins. Co. v. Morton-Scott Robertson Co.*, 106 Tenn. 558, 61 S.W. 787 (1901). Compare *Westenhaver v. German-American Ins. Co.*, 113 Iowa 726, 84 N.W. 717 (1900) (the several insurers made separate demands for appraisal under their respective policies; they selected the same appraiser; no waiver), see also *Hamilton & Phoenix Ins. Co.*, 61 Fed. 379 (6th Cir. 1894). Consult the view when all of the insurers have used the same standard policy. *Wicking v. Citizens' Mut. Fire Ins. Co.*, 118 Mich. 640, 77 N.W. 275 (1898).

90. The demand may not be directed to an appraisal of part of the property, such as, for example, appraisal of salvage separately or alone. *Schusterman v. Hartford*

did the alleged demand identify itself clearly and specifically enough as being a demand for appraisal of the amount of loss and damage?⁹¹

The timeliness of the insurer's demand may be challenged as having been premature or as having been made too late.

When is the demand made prematurely? The appraisal provisions have called for appraisal in event either of "disagreement" between the parties over the amount of loss or damage, or if the parties "fail to agree" thereon. It appears to have been *assumed* by the courts that a *demand for the appraisal* should not qualify under the appraisal provision unless and until the parties shall have come to such disagreement or failure to agree. There is a general accord that the insurer's demand for appraisal before the parties have come to disagreement or failure to agree over the amount of loss and damage is premature and invalid.⁹²

Fire Ins. Co., 253 S.W. 85 (Mo. App. 1923); *Palatine Ins. Co. v. Morton-Scott Robertson Co.*, note 89 *supra*; see also *Stephens v. Union Assur. Co.*, 16 Utah 22, 50 Pac. 626 (1897) (insurer refused demand for appraisal in so far as it applied to the part of the property totally destroyed).

In *Dee & Sons v. Key City Fire Ins. Co.*, 104 Iowa 167, 73 N.W. 594 (1897), the insured claimed that the submission should cover all property which he claimed was covered by the policy; the insurer claimed it should cover only that "shown in policies." Held, waiver against insurer. To like effect, see *American Fire Ins. Co. v. Bell*, 33 Tex. Civ. App. 11, 75 S.W. 319 (1903).

In *Mechanics Ins. Co. v. Hodge*, 149 Ill. 298, 37 N.E. 51 (1894) loss was sustained in two successive fires. After the second, the insurer demanded arbitration of the amount of loss and damage in the first and denied liability for the loss in the second. The demand was ruled invalid on the ground that the losses from the two fires constituted one loss under the policy; the demand for appraisal could not be split.

91. See *Vera v. Mercantile F. & M. Ins. Co.*, 216 Mass. 154, 103 N.E. 292 (1913); *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116, 44 N.W. 1055 (1890); *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 106 N.C. 28, 10 S.E. 1057 (1890); *Madison v. Caledonian-American Ins. Co.*, 43 N.E.2d 245 (Ohio App. 1940).

92. While accrual of disagreement or failure to agree is widely recognized as a prerequisite to the demand, apparently there is some diversity of view in the cases as to what items of conduct transpiring between the parties after loss are sufficient to establish the existence of the required disagreement or failure to agree.

(A). By one view, a showing that the insured reported the amount of his claim (whether by formal proof of loss, or otherwise) and that the insurer, without more, made its demand for appraisal, is not enough. Want of objection by the insurer to the amount as claimed by the insured affords the conclusion at this juncture that the insurer does not disagree. Evidence of objection by the insurer to the amount, and, apparently, further evidence of "bona fide" endeavor to gain agreement with the insured (and failure thereof), is necessary to the make-up of the required pre-demand situation of disagreement or failure to agree.

CAL. *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. 869 (1890).

KAN. See *Baker v. Continental Auto Ins. Ass'n*, 111 Kan. 425, 207 Pac. 828 (1922).

KY. *Continental Ins. Co. v. Vallandigham & Gentry*, 116 Ky. 287, 76 S.W. 22 (1903). The Court observed in passing:

That the insurers merely declined to pay the sum fixed in the schedule and itemized accounts of the insured is not a disagreement, or differing, as contemplated by the contract, so as to authorize a demand of appraisal. It should have been a real difference, based upon the facts which should have been candidly and fully submitted for acceptance by the other side.

The Court let the matter pass, however, since the parties had progressed toward an appraisal on the basis that there was the necessary difference between them.

MICH. See *Zimeriski v. Ohio Farmers' Ins. Co.*, 91 Mich. 600, 52 N.W. 55 (1892). But compare, *Kershey v. Phoenix Ins. Co.*, 135 Mich. 10, 97 N.W. 57 (1903).

It is not clear why this pre-demand situation should be imposed. The courts have suggested no substantial reason. It is not clear how the earlier demand sins against any rights of the insured under the policy. The terms of the appraisal provision do not require it to qualify the demand. Insistence upon the requirement does not aid in expediting the adjustment of the amount of loss or the settlement of the claim; it protects the insured against nothing except appraisal when and if he wins the litigation on the

MINN. *Fletcher v. German-American Ins. Co.*, 79 Minn. 337, 82 N.W. 647 (1900); *Kelly v. Liverpool Ins. Co.*, 94 Minn. 141, 102 N.W. 380 (1905). A "controversy in fact" must exist between the parties; the parties must "actually disagree." (The appraisal provision used the words "a failure of the parties to agree.")

MONT. *Randall v. Phoenix Ins. Co.*, 10 Mont. 362, 25 Pac. 960 (1891).

PA. *Boyle v. Hamburg-Bremen Fire Ins. Co.*, 169 Pa. 349, 32 Atl. 553 (1895). There must be "actual effort to agree."

TEXAS. *Springfield F. & M. Ins. Co. v. Barnett*, 213 S.W. 365 (Tex. Civ. App. 1919). Said the Court:

The disagreement must be one in fact, evidenced by an attempt in good faith on the part of the party demanding arbitration to agree as to the loss. A mere arbitrary refusal to pay the amount demanded, and offering a less amount, does not constitute such a disagreement as is contemplated by the policy.

See also, *Alamo Casualty Co. v. Trafton*, 231 S.W.2d 474 (Tex. Civ. App. 1950).

Compare, *American Central Ins. Co. v. Terry*, 298 S.W. 658 (Tex. Civ. App. 1927).

WIS. *Vangindertaelen v. Phenix Ins. Co.*, 82 Wis. 112, 51 N.W. 1122 (1892). See also, *Phoenix Ins. Co. v. Badger*, 53 Wis. 283, 10 N.W. 504 (1881).

A special refinement upon the nature of the required "disagreement" was voiced by the Supreme Court of Colorado in *Insurance Co. of North America v. Baker*, 84 Colo. 53, 268 Pac. 585 (1927). After reviewing the insured's version of what the insurers adjuster [one Webster] said to the insured after the loss, the Court concluded that his "entire attitude indicates, not an earnest, bona fide effort on Webster's part to reach an agreement as to the amount of the loss, but an attempt to create a disagreement with reference thereto. The provision of the contract relative to appraisement does not contemplate that kind of 'disagreement'."

When the insurer admits loss to the full extent of the coverage, but denies liability on the policy, there is no "disagreement" over the amount. *Harwood v. U. S. Fire Ins. Co.*, 136 Me. 223, 7 A.2d 899 (1939). Consult also, *Radwanski v. Scottish U. & N. Ins. Co.*, 100 N.J.L. 192, 126 Atl. 657 (1924).

Following demand by the insurer the parties have, from time to time, entered upon an appraisal which fails before award. Concerning the probative value of this fact in determining whether or not there was the required disagreement or failure to agree at the time of the demand see *British American Assur. Co. v. Darragh*, 128 Fed. 890 (5th Cir. 1904); *Continental Ins. Co. v. Vallandingham*, 116 Ky. 287, 76 S.W. 22 (1903); *Kersey v. Phoenix Ins. Co.*, 135 Mich. 10, 97 N.W. 57 (1903); *Carp v. Queen Ins. Co.*, 104 Mo. App. 502, 79 S.W. 757 (1904).

(B). By the second view, it seems that less evidence will do to make up the pre-demand disagreement or failure to agree. Apparently almost any communication between the parties whereby the insurer indicates its dissatisfaction with the amount of the insured's claim is adequate to repel inference of acquiescence. Offer of payment of a smaller sum in a tenor of its being a more reasonable valuation of the loss and refusal of it by the insured, quite clearly establish the required situation.

MO. *Murphy v. Northern British & Mercantile Co.*, 61 Mo. App. 323 (1895). Said the Court: "The plaintiff and defendant's adjusting agent were unable to agree on the amount of the loss, that is to say, on the value of the property destroyed. The adjuster made an offer which was rejected by plaintiff. This sufficiently evinced a disagreement so as to bring into operation the provisions of the policy as to arbitration."

N.C. *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 106 N.C. 28, 10 S.E. 1057 (1890).

TEXAS. See *American Central Ins. Co. v. Terry*, 298 S.W. 658 (Tex. Civ. App. 1927). Compare *Springfield F. & M. Ins. Co. v. Barnett*, 213 S.W. 365 (Tex. Civ. App. 1919).

VA. *North British & Mercantile Ins. Co. v. Robinett & Green*, 112 Va. 754, 72 S.E. 668 (1911).

point that the demand was premature. It invites litigation as to whether or not the requirement has been satisfied in the given case.

The very making of the demand by the insurer after knowledge of the amount of the insured's claim should be adequate; it should be deemed to indicate, by that time at least, the insurer's unwillingness to concede and pay the amount as claimed by the insured.⁹³ If the parties thereafter agree upon the amount—well and good; if they do not, the appraisal process will have been expedited.

If the insured is required under the given provision and local rule to make the demand before he can sue, he too should be free to expedite his demand after the amount of his claim has been made known (whether by formal proof of loss, or otherwise) to the insurer for a reasonable time.⁹⁴

The validity of the insurer's demand in these cases also may center upon the question whether or not the parties' disagreement was truly one over the amount of loss and damage, or over some other and different matter.⁹⁵ In the latter instance the demand fails to qualify under the appraisal provision and is invalid.

The demand may be challenged on the ground that it came too late. When is it too late?

The effect of any given lapse of time before the insurer makes the demand is generally tested by considerations as to the reasonableness of the making of the given demand when viewed in the light of all of the facts in the particular case.

93. No case has been discovered in which this precise matter has been resolved. The Supreme Courts of Michigan and Virginia, however, singled out this very situation and declared the demand to have been adequately prefaced with disagreement.

MICH. *Kersey v. Phoenix Ins. Co.*, 135 Mich. 10, 57 (1903). The court commented:

It is said that there was no disagreement as to the amount of loss, and therefore that the defendant had no right to an award by appraisers. We cannot agree with this contention. It appears that defendant knew the amount claimed by plaintiff. Its demand for the arbitration, with this knowledge, indicated its dissatisfaction with and unwillingness to pay that amount.

VA. *North British & Mercantile Ins. Co. v. Robinett & Green*, 112 Va. 754, 72 S.E. 668 (1911). "It will not do," said the court, "to say that there was no disagreement as to the loss, and therefore no reason for an appraisal, when the letter of July 2, 1909, demanding the appraisal, distinctly stated that the writer, as the agent of the insurer to adjust the loss, considered the claim made in the proof of loss furnished it was excessive."

94. Under this view requiring the insured to make demand, it seems that, when the insured pleads generally his performance of the conditions of the policy, the insurer must, in order to invoke the appraisal provision and put the insured to proof of his compliance (or the insurer's waiver of the provision), plead and prove the accrual of disagreement over the amount of loss and damage. See *Kelly v. Liverpool Ins. Co.*, 94 Minn. 141, 102 N.W. 380 (1905); *Ohio Farmers' Ins. Co. v. Titus*, 82 Ohio St. 161, 92 N.E. 82 (1910). Compare *Lamson Consol. Store Service Co. v. Prudential Fire Ins. Co.* *supra* note 67 (C).

95. MINN. *Mahoney v. Minnesota Farmers' Mut. Ins. Co.*, 136 Minn. 34, 161 N.W. 217 (1917) (policy covered crops against loss from hail; the dispute centered

Generally this determination is left to the jury. In *Smith v. California Ins. Co.*,⁹⁶ before the Supreme Court of Maine, the insurer had delayed from November 21, 1888, when the insured made proof of loss, until August 5, 1889, before demanding appraisal. The court sustained the trial judge who had refused to rule as a matter of law that this delay alone constituted waiver. But the court further affirmed the action of the judge in submitting this delay *along with other matters* to the jury to determine whether or not there was waiver.

These "other matters" appearing from time to time in the cases have been attending circumstances generally consisting of one or more, or some combination, of the following items of evidence, namely (1) evidence tending to show that the insurer postponed its demand with more or less purpose to forestall prompt settlement and payment of the loss, or with indifference for the insured's solicitations for quick adjustment of the amount of loss; (2) evidence tending to show that the insurer delayed its demand with more or less purpose to force settlement on its own terms, or to gain other undue advantage under the terms of the policy; (3) evidence of a course of conduct of the insurer in dealing with the insured about the loss and settlement which might have induced the insured to believe, before the demand, that the insurer intended or wanted no appraisal—something akin, perhaps, to repudiation or abandonment of the appraisal provision.⁹⁷

upon whether or not the policy covered crops on a certain section of land. *Held*, not covered by the appraisal provision).

Mo. *Hawkinson Tread Tire Co. v. Indiana Lumbermens M. & I. Co.*, 362 Mo. 823, 245 S.W.2d 24 (1951) (difference over amount payable derived from different interpretations as to the terms of the policy; *held*, not one over the amount of loss).

N.Y. *Rosenwald v. Phoenix Ins. Co.*, 50 Hun. 172 (N.Y. 1888) (difference as to how the amount of loss should be figured—whether at market value or at cost of the property; *held*, not a difference over the amount of loss).

Tex. *Virginia F. & M. Ins. Co. v. Cannon*, 18 Tex. Civ. App. 588, 45 S.W. 945 (1898); *Adams Casualty Co. v. Trafton*, 231 S.W.2d 474 (Tex. Civ. App. 1950) (disagreement said to be "merely as to the basis of estimating the loss").

Wis. See *Phoenix Ins. Co. v. Badger*, 53 Wis. 283, 10 N.W. 504 (1881) (difference over "the liability of the company to pay anything whatever"—*held*, not one over the amount of loss); See also, *Nelson v. Atlanta Home Ins. Co.*, 120 N.C. 302, 27 S.E. 38 (1897); *Williams v. American Ins. Co.*, 196 Ill. App. 370 (1915), 96, 87 Me. 190, 32 Atl. 872 (1895).

97. *Chainless Cycle Mfg. Co. v. Security Ins. Co.*, 169 N.Y. 304, 62 N.E. 392 (1901) is most frequently (and approvingly) cited in the other cases ruling on this instance of waiver based on the delay of the demand. The case embraced a combination of the foregoing "other matters" which were packaged with the insurer's delay in demanding appraisal and sent to the jury on the question of waiver. Insured notified the insurer of the loss on the date it occurred, August 16, 1899. The insurer referred the adjustment of the claim to an adjuster; various negotiations followed; and, as requested by the adjuster, the insured filed proof of loss on August 30, 1899. Insured pressed for quick settlement so that it might dispose of the salvage without further loss or expense. Adjuster expressed surprise to the insured that its claim of loss was so large and advised the insurer that the amount claimed in the proof of loss was exorbitant. Insured formally demanded appraisal; the adjuster replied that he did not want an appraisal but wanted to settle. A figure for a proposed settlement was concluded between the adjuster and insured and the insured thereupon sold

Time limitations for the insurer to make its demand for appraisal also have been ruled in connection with the provision in the policy fixing the times for payment of loss under the policy. That provision frequently has been to the effect that "the loss shall not become payable until sixty days [or other stated period] after the notice, ascertainment, estimate and satisfactory proofs of loss herein required have been received by this company, including an award when appraisal has been required."

May the insurer have the full 60 days (or other stated period) after proof of loss in which to make its demand for appraisal, or is it subject to "a reasonable time" limitation to be determined by the jury? Is its opportunity to make demand foreclosed when the 60-day period expires?

According to the prevailing view, a demand before the close of the 60 days may be tested for its reasonableness before the jury; but a demand for appraisal *after* that 60-day period has expired comes too late; it is too late as a matter of law.

In so ruling, the Supreme Court of Oklahoma put the matter as follows: The insurer "*must demand appraisal, if at all, within a reasonable time, to be determined by the jury under the circumstances of each case, from the date as the circumstances of each may show to be the period at which the desirability or necessity of appraisal or inspection of the goods first arises, such reasonable time, in no event to be carried beyond the period*

the salvage. Insurer repudiated this settlement and on September 12 or 13, 1899 formally demanded appraisal. Total elapsed time: August 16, 1899, date of loss, to September 12 or 13, 1899, date of demand. Insured commenced suit on November 2, 1899.

The jury found waiver. The Court observed that "the main question that we are called upon to decide is whether there was *any evidence to warrant the jury in finding a waiver.* (italics supplied). The jury was sustained.

The Court, after reviewing the foregoing course of conduct on the part of the insurer and insured, concluded:

"*The evidence warrants the inference that it [the insurer] did not desire an appraisal and had no intention of requiring one until it thought it could take advantage of the plaintiff.* Under these circumstances, we cannot say, as matter of law, that the demand of the defendant for an appraisal was reasonable; for it was bound to act in good faith, and not to remain silent when it was its duty to speak." (italics supplied).

By the way of further comment upon the required course of conduct of the parties, including the making of demand for appraisal in such cases, the Court observed as follows:

That right [to appraisal] is not indefinite as to time, but must be exercised within a reasonable period, depending upon the facts of the particular case. Neither party can so use the right as to take undue advantage of the other; but both must act in good faith. It is not a weapon of attack, but of defense, and a party who intends to use it must give reasonable notice of such intention; for its omission to do so will be evidence of waiver, more or less conclusive according to the circumstances. The insurer, for instance, knowing that the insured desires a prompt appraisal or an adjustment, so that the property may not suffer further injury before it is sold, cannot postpone its demand for an appraisal until after the insured, misled by its acts, has been placed in a position where one is impossible. (italics supplied).

See further the views advanced in *Provident Washington Ins. Co. v. Wolf*, 168 Ind. 690, 80 N.E. 26 (1907).

of 60 days after the receipt of the proof of loss, since it is apparent that, if no demand be made within sixty days after the receipt of the proof of loss, the right to the payment of the amount due, if any, becomes absolute, and may not be changed by any subsequent act of the insurer." (Italics supplied.)⁹⁸

On the other hand, the Supreme Court of Virginia has declared that the insurer has the 60 days within which to make its demand.⁹⁹

When the insured is required to make the demand before he can maintain his action to collect, greater indulgences may be expected to

98. *Springfield F. & M. Ins. Co. v. Hays & Son*, 57 Okla. 266, 156 Pac. 673 (1916).

To like effect: U.S. See *Hamilton v. Phoenix Ins. Co.*, 61 Fed. 379 (6th Cir. 1894).

CAL. *Winchester v. North British Ins. Co.*, 160 Cal. 1, 116 Pac. 63 (1911).

Consult also, *Covey v. National Union Fire Ins. Co.*, 31 Cal. App. 579, 161 Pac. 35 (1916).

LA. *Stone v. Commercial Fire & Cas. Co.*, 50 So.2d 327 (La. App. 1951).

MICH. See *Brock v. The Dwelling House Ins. Co.*, 102 Mich. 583, 61 N.W. 67 (1894).

MISS. See *Sykes v. Royal Cas. Co.*, 111 Miss. 746, 72 So. 147 (1916).

N.Y. *Langsner v. German Alliance Ins. Co.*, 67 Misc. 411, 123 N.Y. Supp. 144 (1910).

TEXAS. See *American Central Ins. Co. v. Heath*, 29 Tex. Civ. App. 445, 69 S.W. 235 (1902).

Consult further, *Hays v. Milford Mut. Fire Ins. Co.*, 170 Mass. 492, 49 N.E. 754 (1898).

It seems that the Florida Supreme Court starts the 60 days loss-payable provision from the date when the insurer admits liability for some amount. Insurer's demand after said 60 days is too late. *Bear v. New Jersey Ins. Co.*, 138 Fla. 298, 189 So. 252 (1939).

Suppose that the insurer makes demand for appraisal within the 60 days, but not until the very last days of the period. Arrangements for the appraisal are not likely to be concluded until after "the right to payment of the amount due, if any," to quote the Oklahoma Court "becomes absolute" (*supra* at 276, 156 Pac. at 676). There is some authority indicating that, as a matter of law, such demand is too late. See *Zimeriski v. The Ohio Farmers' Ins. Co.*, 91 Mich. 600, 52 N.W. 55 (1892); also *Langsner v. German Alliance Ins. Co. supra*.

And in *Fireman's Fund Ins. Co. v. Caye*, 14 Ky. L. Rep. 810 (1893), it is written that "where the policy provides that the loss shall be payable within a certain time after the proofs of loss are received, the request for arbitration must be made within that time, and not only within that time, but *early enough* to permit arbitration to be had before the expiration of the time." See also the views expressed in *Hamilton v. Phoenix Ins. Co. supra*.

Even if the delay until the last hours of the 60 day period in making the demand is not fatal as a matter of law, it seems probable that a verdict of waiver based only upon such delay (without evidence tending to establish any of the "other matters") will be sustained. See *Boston Ins. Co. v. Kirby*, 281 S.W. 275 (Tex. Civ. App. 1926). Said the Court:

In this case appellants waited for 58 days on one policy and 59 on the other, after receiving proof of loss, before making demand. It being a question of fact as to what would constitute a reasonable time, and the jury having found against appellee on that issue, it cannot be said that appellants were within their contractual rights at the time their demand was made.

99. *North British & M. Ins. Co. v. Robinett*, 112 Va. 754, 72 S.E. 668 (1911).

In truth, the 60 day period had not expired when the demand was made; proof of loss was received by the insurer on May 18, 1909; the demand, a letter, was received by the insured on July 5, 1909. Compare the views as voiced in *Tilley v. Connecticut Fire Ins. Co.*, 86 Va. 811, 11 S.E. 120 (1890) with which compare, in turn, those advanced in *Bratley v. Brotherhood of American Yeomen*, 159 Minn. 14, 198 N.W. 128 (1924).

sustain the validity of his demand. Such litigation as there has been in this connection has involved chiefly the issue whether or not the insured's demand came too late.¹⁰⁰

In *McNees v. Southern Ins. Co.*¹⁰¹ the insurer refused a demand for appraisal from the insured which came "near two years after the loss." In saving the plaintiff's delayed demand and suit to recover on the policy, a Missouri Court of Appeals based its ruling upon the following considerations:

"Though it be true that the insured, in bringing suit, thereby holding the affirmative and the *onus* of showing himself entitled to sue, must act if the other does not, yet the company may very well, if it so desires, take the initiative, on a difference arising, and demand an arbitration. If the company, knowing there is a disagreement as to the amount of the loss and of its right to have an arbitration, omits to call for such arbitration it ought not to be heard to complain of plaintiff's mere delay in making the offer."¹⁰² The court expressed the further view that its position in this connection was "in harmony with that rule of law which disfavors forfeitures except when clearly demanded by the stipulation of the parties."¹⁰³

100. See, however, *Milwaukee Ins. Co. v. Schallman*, 188 Ill. 213, 59 N.E. 12 (1900) (issue as to whether or not the demand served on one who was an agent of the insurer was binding on the insurer); *Madison v. Caledonian-American Ins. Co.*, 43 N.E.2d 245 (Ohio App. 1940) (issue as to whether the communication was a demand for appraisal, or something else); *Morley v. Liverpool Ins. Co.*, 85 Mich. 210, 48 N.W. 502 (1891) (issue as to proper pleading by insurer of want of appraisal).

101. 69 Mo. App. 232 (1897). To the same effect in the same court, *Johnson v. Phoenix Ins. Co.*, 69 Mo. App. 226 (1897); *Ciapanna v. Lincoln Fire Ins. Co. of N.Y.*, 153 Ore. 395, 56 P.2d 1113 (1936). See also *Schripfer v. Rockford Ins. Co.*, 77 Minn. 291, 79 N.W. 1005 (1890); *Messer v. Williamsburg City Fire Ins. Co.*, 42 R.I. 460, 108 Atl. 832 (1920). Compare the views and rulings in *Graham v. German-American Ins. Co.*, 75 Ohio St. 374, 79 N.E. 930 (1907).

102. If demand were made only after so long a period that the property "would be in such condition that an appraisal would be an idle ceremony," perhaps it would be too late. See *Reilley v. Agricultural Ins. Co.*, 311 Ill. App. 562 (1941); also the *McNees* and *Johnson* cases, *supra* note 101. Consult further, *Morley v. Liverpool Ins. Co.*, *supra* note 100; *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291, 79 N.W. 1005 (1890); *Hartford Fire Ins. Co. v. Conner*, 79 So.2d 236 (Miss. 1955). Compare *Ciapanna v. Lincoln Fire Ins. Co. of N.Y.*, *supra* note 101.

103. Suppose that the demand is made only after the insured has commenced suit to collect on the policy?

Two general combinations of circumstances have come to pass involving this general question.

(1) In the first the insured, being required to make the demand, failed to do so until after he had commenced suit to collect on the policy; the insurer refused because of this delay.

Judicial opinion on this situation appears to favor excusing the insured's delay and holding the insurer's refusal a waiver.

In *Johnson v. Phoenix Ins. Co.*, 69 Mo. App. 226 (1896), demand was made by the insured for the first time while his action was pending. Insurer refused. It had pleaded the appraisal provision against the action. That action was dismissed. The insured was allowed to maintain his second action over insurer's plea of the appraisal provision. The insurer's foregoing refusal was held to be a waiver. To like effect see *Gragg v. Northwestern Ins. Co.*, 140 Mo. App. 685 (1910); and the dissenting opinion in *Schweir v. Atlas Assur. Co.*, 227 Mich. 104, 198 N.W. 719

Note: This present study will be concluded in a subsequent issue of the Miami Law Quarterly.

(1924). See also *Barton v. Automobile Ins. Co.*, 309 Mass. 128, 34 N.E.2d 516 (1941).

(2) In the second situation the insurer had duly demanded appraisal *and the insured refused*; then the insured, after commencing suit, made overtures for appraisal and the insurer refused or disregarded them. In *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291, 79 N.W. 1005 (1890) the Court held that the insured could maintain his action; that the insurer's refusal constituted waiver of its right to appraisal. "There is no evidence," said the Court, "that the defendant has, by reason of the delay, been deprived of any legal right or suffered any damage; not even the loss of evidence. . . . It is not particularly the length of the delay, but the prejudicial consequence of it, that is material."

On the other hand, in *Zalesky v. Home Ins. Co.*, 102 Iowa 613, 71 N.W. 566 (1897), the insured started suit after refusing insurer's demand for appraisal. *Held*, error to grant insured (over objection by insurer) a continuance to allow him to offer appraisal; also that refusal by the insurer of the insured's demand, made after his action was commenced, was not waiver. Nor could the insured use a supplemental petition to escape insurer's plea of the appraisal provision.

In *Schwier v. Atlas Assur. Co.* *supra*, the insured also started suit after refusing insurer's demand. While the action was pending the insured tendered an offer or demand for appraisal; insurer refused. The majority of the court ruled that the insured could not maintain the action; that the insurer's refusal was not waiver; that a party litigant may not "sue first and obtain his cause of action afterwards."

Consult also, *Barton v. Automobile Ins. Co.*, 309 Mass. 128, 34 N.E.2d 516 (1941); *Goldstein v. National Fire Ins. Co.*, 106 Wash. 346, 180 Pac. 409 (1919).