the defendants' counsel. *Vide* Young v. Upshur, 42 La. Ann. 362, 7 South. Rep. 557. In that case the controversy was in reference to the ownership of an undivided interest or share in a certain judgment rendered by this court on appeal from the parish of Tensas, in this state, the plaintiffs therein being citizens of the District of Columbia, and the case at the time being still pending and undecided in the supreme court on writ of error, and the suit in which the claim of an interest was made having been brought in the parish of Tensas, wherein the plaintiffs in the original suit were cited throug' a curator *ad hoc*. To that suit the exception was that such service as was made on the curator *ad hoc* was not due process of law, and failed to confer on the court jurisdiction thereof; but we held that the jurisdiction of this court was complete, and the judgment binding on the absentees, on the ground that the proceeding was not one *in personam* but one *quasi in rem*, "its object being to obtain judicial recognition and enforcement of a specific interest in tangible property in the parish of Tensas in this state," etc. In several similar cases we have recently maintained the jurisdiction of district courts as grounded on like service. Notably in Duruty v. Musacchia, 42 La. Ann. 357, 7 South. Rep. 555; McKenzie v. Bacon, 38 La. Ann. 765; and Robbins v. Martin, 43 La. Ann. 488, 9 South. Rep. 108. And one remark that was made in our opinion in the last-cited case—that "if, indeed, a non-resident cannot be brought into a court of this state in such a case, such a cause of complaint as that propounded by the plaintiff, though well grounded in our law, would be practically remediless,"—is strictly applicable to the exception taken in the case at bar. The grounds of nullity assigned are not well taken.

Second. The nullity of the judgment of revival from which the present appeal is prosecuted.

(*a*) Because of the variance between the party plaintiff in the former suit for revival and the parties plaintiff in the instant suit, and the incapacity of the present plaintiffs to recover judgment. Certainly, if Ottilie Bertron, executrix, was capacitated to institute suit, and stand in judgment in the former revival suit, the three joint co-executors are likewise capacitated so to do. The variance that is suggested is of no consequence whatever. It cannot fatally affect the judgment. What was said of the want of capacity in a foreign executor to bring suits in the courts of this state, in the preceding part of this paragraph, as appertaining to the former revival suit, is strictly applicable to the instant case. Neither objection is good.

(*b*) Because the judgment by default that was entered up against the defendant Stewart was never subsequently confirmed. That there was a judgment regularly rendered and signed there is no doubt. That the defendant Stewart was personally cited, and that there was also appointed a curator *ad hoc* to represent him as an absentee on whom service was made, cannot be denied. It is true that the judgment does not formally state that by reason of said default having been made final it was rendered and signed. But it is impossible for us to conceive the ground of defendants' complaint on that account, or to appreciate his objection of absolute nullity of the judgment; for if the judgment by default was, in effect, made final, he is without cause of complaint; and if it was not made final it was evidently abandoned, and judgment was rendered on the issue joined between plaintiff and the curator *ad hoc* on his answer. This, to our thinking, is the true state of the case. In either event the judgment is, to all appearances, valid.

3. It is not correct to say that the instant suit is one to revive the former judgment of revival. A suit to revive, as said in Hammett v. Sprowl, 31 La. Ann. 325, is not a new suit, but a new proceeding in the original suit. Its sole object is to legally and judicially interrupt prescription. Once the revival suit is brought to a termination by a judgment, its object is accomplished, and a 10-years lease of life is given to the original judgment. At the expiration of this lease a new revival suit must be brought in order to interrupt prescription, and give to the original judgment another 10-years lease of life. These two revival proceedings are separate and independent of each other, though having same object in view. Hence it was matter of no consequence that the former suit was brought in the name of one executrix, and the latter was brought in the name of three joint co-executors. The Code says expressly "that any party interested in any judgment may have the same revived at any time before it is prescribed." Rev. Civil Code, art. 3547. Under the authority of this article this court held in Martinez v. Succession of Vives, 32 La. Ann. 305, that any attorney at law entitled to only a contingent interest in a judgment for the payment of his fees had sufficient interest in it to authorize him to bring suit for its revival, and to revive the whole judgment, and not merely a restricted and limited interest in it. Our conclusion is that it was of no consequence to the defendants that one revival suit was brought by one executor, and the other by three co-executors. After a thorough study of this case, and a full examination of all its details, we are satisfied that the original judgment has been legally and properly revived and kept alive; that the defenses pleaded of prescription and nullity are not well grounded in law; and that the judgment appealed from is correct, and it is therefore affirmed.

(28 Fla. 209)

HANOVER FIRE INS. CO. v. LEWIS *et al.*

(*Supreme Court of Florida.* Dec. 7, 1891.)

INSURANCE — ACTION ON POLICY — PLEADING—CHANGE OF INTEREST—PROOFS—WAIVER.

1. Where a plea to an action brought upon a policy of fire insurance is interposed alleging that no preliminary proofs of loss have been furnished by the assured according to the provisions of the policy requiring such proofs as a condition precedent to the right to sue thereon, a replication to such plea is bad that simply alleges

"that proofs of loss were furnished on blank forms furnished to plaintiffs by defendant for that purpose," without alleging that the proofs so furnished were in accordance with the requirements of the policy; and a demurrer to such replication should be sustained.

2. G. and E. were partners in a general banking business, and as such partners were the sole owners of a house and the land upon which it was situated, which house they insured against loss by fire, the policy issued to them containing the following provision: "If the property be sold or transferred, or any change take place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, it should render the policy void." After the issuance to them of the policy, but prior to the destruction of the property by fire, G. and E. admitted W. into their firm as a partner, upon a verbal agreement that he was to have no interest in the properties of the former firm, but a fixed interest only in the profits of the firm's business generally. *Held*, that this did not give to W. any interest in the insured property, nor work such change in the title, ownership, or possession of the property as would avoid the policy under the above-quoted provision therein.

3. Where the insurers, after receipt of proofs of loss, in a correspondence by letter repeatedly call upon the assured for further or more particular information as to the interest or ownership that a party named in the proofs has in the insured property, and in such correspondence and otherwise are silent as to any other defect in the form or substance of such proofs, and fail to call the attention of the assured to any other defect that may exist in the proofs furnished, such silence and failure of the insurers to call the attention of the assured thereto *held* to be a waiver on their part of any defect in such proofs not discovered by them to the assured; and *held* that, where the particular matter or information asked for in such correspondence is not requested to be furnished in verified form, such failure to request verification thereof is a waiver of that formality. *Held, further*, that the information asked for by letter, when supplied by letter, will be treated as supplementary to such proofs upon the particular subject to which they relate. *Held, further*, that such proofs of loss and letter correspondence supplementary thereto are admissible in evidence at the trial to establish the fact that the requirements of the policy as to the furnishing of preliminary proofs of loss have been complied with before institution of suit.

4. Where the assured inadvertently make an incorrect statement or mistake in the preliminary proofs of loss furnished to the insurers after loss, such statement or mistake may be afterwards corrected and explained by parol testimony at the trial of a suit upon the policy, where the same explanation or correction has been asked for by letter and given in substance by letter prior to the institution of the suit.

5. In the trial of a suit upon a policy of fire insurance an unverified estimate of the cost of replacing the destroyed property made by a party while in life, but at the time of the introduction of such estimate deceased, is inadmissible in evidence for any purpose; and the fact that the party who made such estimate is dead at the time the same is offered in evidence does not render such estimate admissible.

6. Where a policy of fire insurance contains the following provision: "In case differences shall arise touching any loss or damage after the proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to arbitrators indifferently chosen, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the companies, respectively, under this policy,"—*held* to be a valid and binding covenant, and that when the parties under its provisions have submitted the finding of the amount of such loss to such arbitration, they are mutually bound as to the "amount" of the loss by the award of the arbitrators, unless such award, under proper pleadings, is avoided for fraud or other matter legally recognizable as vitiative thereof, and that, unless so avoided, the assured are limited in their right of recovery to the amount so awarded.

7. The arbitration provided for under such provision in a policy of insurance does not undertake to oust the courts of their jurisdiction, and is not obnoxious to law. Neither is it necessary that such arbitration should be conducted in accordance with the statute. McClel. Dig. p. 105 et seq. Neither is it necessary, to make such award available, that the same should be accepted or acted upon in any way by the parties. Neither is it necessary, to render such award available as a defense in limitation of the amount of recovery, that the amount of such award should be paid or tendered. Such an award, when specially pleaded in limitation of the recovery sought for, is admissible in evidence upon the trial of a suit upon the policy.

8. It is error for the trial court in a charge to the jury to supply any fact from other facts adduced in evidence, but should leave every fact, and its establishment or non-establishment, to the determination of the jury alone.

9. Where a policy of insurance provides that the amount of the loss insured shall be due and payable 60 days after the furnishing by the assured of proofs of loss as provided by the policy, the assured are entitled to interest upon the amount of their recovery from a date 60 days after the furnishing by them of such proofs of loss.

(*Syllabus by the Court.*)

Error to circuit court, Leon county.

Action by George Lewis, Edward Lewis, and William C. Lewis against the Hanover Fire Insurance Company to recover on a policy of insurance. Verdict and judgment for plaintiffs. Motion for a new trial denied. Defendant brings error. Reversed, and new trial directed.

W. A. Blount and *Fred T. Myers*, for plaintiff in error. *R. W. Williams*, for defendants in error.

TAYLOR, J. On the 15th of August, 1885, George Lewis, Edward Lewis, and William C. Lewis, styling themselves as partners under the firm name of B. C. Lewis & Sons, instituted their action in *assumpsit* in the circuit court of Leon county against the Hanover Fire Insurance Company, a corporation of the state of New York, having an agency at Tallahassee, in Leon county, for the recovery of one-half of the amount of a policy of insurance for $5,000, issued to them on April 18, 1882, by the Germania Fire Insurance Company and the Hanover Fire Insurance Company, as underwriters, wherein each of said companies, severally, each for itself, and not one for the other, became the insurers, for one-half the amount of said policy, for a term of three years; the said policy containing a covenant that in the event the assured had to resort to judicial proceedings to enforce their claims under said policy, it should not be necessary to proceed against each of the insurers, but that such action might be brought against either of said companies, and that the other should be bound and concluded by the result of such action in the same manner and to the same effect as if it had been prosecuted against each of them separately with the like result.

To the declaration in the cause the defendant company interposed five pleas, as follows: (1) *Non assumpsit;* (2) *nil debet;* (3) that the plaintiffs did not, before the institution of their suit, make and furnish to defendant proofs of their alleged loss in accordance with the requirements of the policy of insurance sued upon; (4) that subsequent to the issuance of the said policy of insurance, and before the occurrence of the said fire, there took place a change in the title and possession of the said property described in the said policy of insurance, in that the plaintiff William C. Lewis, who had no interest therein when the said policy was issued, became in part an owner thereof with the plaintiffs George Lewis and Edward Lewis, and entered into possession thereof with them before the said fire; (5) that if the plaintiffs are entitled to recover from the defendant, they are entitled to recover only the sum of $2,086.37½, with interest thereon, because the said plaintiffs and defendant, on the 10th day of April, A. D. 1885, submitted to an arbitration consisting of B. F. Langley and T. J. Rawls, together with a third person to be chosen by the said arbitrators, if necessary, the appraisal and estimate, at the then cash value, of the damage by the said fire to said property, which appraisal and estimate by them, or any two of them, in writing was to be binding on both parties as to the actual cash value of or damage to the said property, but without reference to any other question or matters of difference within the terms and conditions of the insurance, a copy of which said submission to arbitrators is hereto annexed marked "A," and made a part of this plea. And thereupon, to-wit, on the 11th day of April, A. D. 1885, the said Langley and J. M. Wilson, the third party chosen by the said arbitrators to determine with them the said question, did make, write, and deliver to the said plaintiffs and the defendant their award and appraisal in the premises, and by such award and appraisal did appraise and arbitrate the damage done by the said fire at the sum of $4,172.75.

To the first and second of these pleas the plaintiffs joined issue. To the third and fifth pleas the plaintiff demurred, which demurrer, upon subsequent argument, was overruled.

To the defendant's fourth plea the plaintiffs interposed a replication in avoidance of the defense of a change of title in the property insured anterior to the fire that is set up in the defendant's fourth plea. After the overruling of their demurrer to the third and fifth pleas of the defendant, the plaintiffs replied to the said pleas, as follows: "The plaintiffs, as to the third plea, say that they did make and furnish to defendant proofs of their loss on blank forms furnished to plaintiffs by defendant for that purpose, and were not, therefore, required to furnish other. The plaintiffs, as to the fifth plea, say that the so-called 'arbitration' was not in accordance with the statutes of this state in such cases made and provided, nor in accordance with the terms of the policy of assurance between plaintiffs and defendant, nor with the 'special agreement' for submission to two builders; that said two builders, nor either one of same, with a properly constituted umpire, have made 'no' award in accordance with said agreements; that the so-called 'award' has not been accepted, nor acted upon by either party, but was promptly repudiated by plaintiffs, and defendants so advised; that said agreement of submission was in no sense legal, just, or equitable, and had no binding force, in that its effect was to bind one party only to the prospective award; that one arbitrator was committed in favor of one party, and the umpire relied wholly upon the statements of the arbitrator or arbitrators, without personal knowledge and without testimony."

To this replication to the third plea the defendant demurred, and at the same time moved to strike out the replication to the fifth plea. Upon subsequent argument the demurrer to the replication to the third plea was overruled; but the motion to strike out the replication was granted.

At this stage of the proceeding, by leave of the court, the plaintiffs amended their declaration by striking out the name of William C. Lewis, as a party plaintiff, and by styling their suit "George Lewis and Edward Lewis, formerly partners under the firm name of B. C. Lewis & Sons," as plaintiffs. Upon this amendment of the declaration the defendant withdrew its first plea of *non assumpsit*, and pleaded the others over to the declaration as amended. The plaintiffs then filed a replication to the defendant's third plea, substantially the same that they before interposed to same, which replication was demurred to again by the defendant, and the demurrer again overruled, which ruling was erroneous. The demurrer of the defendant to the replication to defendant's third plea should have been sustained, for the obvious reason that the replication demurred to does not allege that proper proofs of loss were made by the plaintiffs and furnished to the defendant, or that proofs were thus made and furnished in compliance with the provisions for such proofs in the policy contained as one of the covenants therein, but simply alleges that "proofs of their loss were furnished to defendant by plaintiffs of blank form furnished to plaintiffs by defendant for that purpose," when the pith of the third plea, to which it was intended as a reply, was that no proofs "in accordance with the requirements of the policy sued upon" had been furnished. The replication does not dispute or take issue upon this assertion in the plea, but undertakes to side track the defense tendered by the plea, by substituting proofs made on a blank form for the proofs called for by the provisions of the policy. The proofs furnished as alleged in this replication, though filling up the blanks in a dozen set forms, may still have fallen far short of filling the requirements of the policy sued upon.

Upon defendant's fourth plea the plaintiffs joined issue. To the fifth plea the plaintiffs interposed a replication containing 26 numbered grounds of objection. Upon the filing of this replication the defendant moved the court to require the plaintiffs to elect the ground therein upon

which they would rely, and to strike out the others. This motion seems, from the record, to have been "granted," and then by a subsequent order of the court it was specifically ordered that the ground of the replication "contending for a tender of the amount of the award set up in the fifth plea" should be stricken out. Afterwards the plaintiffs seemed to have abandoned their replication to the fifth plea, and filed a general joinder of issue thereon. This disposes of the pleadings in the case.

On the 20th of January, 1888, the cause was tried before a jury, and resulted in a verdict for the plaintiffs in the sum of $3,000. Motion for new trial was made and denied, and judgment for $3,000 entered against the defendant company, and from this judgment the case is brought here upon writ of error.

The errors assigned are as follows: (1) The overruling of defendant's demurrer to plaintiffs' replication to third plea; (2) the admission in evidence of the papers denied to be proofs of loss; (3) the admission of the testimony of Edward Lewis as to William C. Lewis' interest in the property insured; (4) the admission in evidence of the letters between plaintiffs and defendant; (5) the admission of the testimony of Edward Lewis as to whereabouts of T. J. Rawls; (6) the refusing to admit in evidence the arbitration and award between plaintiffs and defendant; (7) the giving of each and every of the special charges asked by the plaintiffs; (8) the refusing of each and every of the special charges asked by the defendant; (9) the refusing of defendant's motion for a new trial. These assignments will be considered in the order in which they come.

The first assignment has already been disposed of, and held to be error.

The 2d, 3d, and 4th assignments will be discussed together, as they raise the same or closely kindred questions. It seems that when the policy of insurance sued upon was issued, George Lewis and Edward Lewis alone composed the firm of B. C. Lewis & Sons, to whom the policy was issued, and that they alone, as such partners, at the time of the issuance of the policy, owned and held the legal title to the property covered by the policy. As testified to by Edward Lewis, subsequent to the issuance of the policy, but prior to the loss by fire, William C. Lewis was taken into the firm as a member thereof to share in the profits alone to a certain limited extent. It is contended for the plaintiff in error that this worked a change in the title, possession, interest, and ownership in the assured property, giving to the new partner, William C. Lewis, an interest therein to such an extent as to avoid the policy under the following covenant therein: "If the property be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance," it should render the policy void. In that clause of the policy providing for the furnishing of proofs in case of loss it is further stipulated, as follows: "If the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth with their respective interests therein certified to by them." In the proofs of loss that were furnished to the defendant company after the fire, and that were subsequently, at the trial of the cause, admitted in evidence over the defendant's objection, we find the following statement sworn to by Edward Lewis and William C. Lewis: "The property insured belonged, at the time of the fire, to B. C. Lewis & Sons, a firm composed of George, Edward, and William C. Lewis, and at the time of effecting the insurance it belonged to B. C. Lewis & Sons, a firm composed of George and Edward Lewis." After the receipt of this proof of loss by the defendant company a correspondence, by letter, of considerable length was had between the insurers and assured, which letters were subsequently admitted in evidence over the defendant's objection. In the first of these letters, dated May 22, 1885, from the defendant to the plaintiffs, in which the receipt of the proofs of loss is acknowledged, no objection is raised to the form or sufficiency of the proofs furnished except that the plaintiffs are asked therein for information as to the "nature and extent of William C. Lewis' interest in the present firm of B. C. Lewis & Sons." To this the plaintiffs replied, under date of May 26, 1885: "W. C. Lewis, as stated in proof of loss, is a partner in our firm, having been admitted January 1, 1883, with a fixed share of profits." This did not seem to satisfy the defendant company, as they again wrote on May 29, 1885, to the plaintiffs, asking them to "state what share of the 'Glenwood' property was owned by William C. Lewis, as a member of the firm, at the time of the fire." To this the plaintiffs replied on June 2d: "W. C. Lewis had no interest in the Glenwood property, except as stated in our letter of 26th May." In none of this correspondence is the objection urged that the explanation of W. C. Lewis' connection with the property should be under oath; and in none of this correspondence is there any other objection or question raised with reference to the proofs of loss, either as to their form or substance. The plaintiffs, in reply to the inquiries of the defendant in relation to this matter, state distinctly that W. C. Lewis had no interest in the property, but was limited to a fixed interest in the profits of the firm's business. What further information could have been reasonably desired or given on the subject it is difficult for us to see. To have demanded more presents the appearance on the part of the defendant of a desire to quibble at straws. It was an error very natural to be made by men not expert in the nice distinctions growing out of the ownership of partnership properties to state, as was done in these proofs of loss, that the incoming partner, William C. Lewis, owned an interest in the insured property; but when the matter is drawn pointedly to their attention the true explanation is at once made, showing that he in reality has no interest in the property of the firm as originally composed, but only a fixed interest in the profits of the business generally. In the light of the explanation given by Edward Lewis in his testimony,

as to the terms upon which William C. Lewis was admitted into the firm, we are of the opinion that he did not acquire any such interest in the property as would avoid the obligation of the defendant to pay the loss. In this case, according to the evidence of Edward Lewis, (and it is nowhere contradicted,) no written contract of partnership was gone into when William C. Lewis entered the firm. Nothing was done except to admit him to membership by a verbal agreement that he was to have a fixed interest only in the profits of the general business. With this testimony we are of the opinion that he did not acquire any such interest in this property as would defeat the right of George and Edward Lewis to recover upon this policy. In Lindley on Partnership (volume 1, p. 329) it is said that "the only true method of determining, as between the partners themselves, what belongs to the firm and what not, is to ascertain what agreement has been come to upon the subject. If there is no express agreement, attention must be paid to the source whence the property was obtained, the purpose for which it was acquired, and the mode in which it has been dealt with." To the same effect is Pars. Partn. § 366. Applying this test by getting from Edward Lewis, on the stand, the agreement between the partners here, the result is that William C. Lewis, on entering the firm, acquired no interest in its properties, but a prospective interest only in the profits of the business generally. Stumph v. Bauer, 76 Ind. 157. We do not think there was any error in admitting in evidence the proofs of loss furnished to the defendant, nor in admitting the correspondence that passed in reference thereto between the defendant and the plaintiffs, nor in permitting Edward Lewis, on the stand, to testify fully as to the *status* of William C. Lewis in the firm. The correspondence was directly pertinent to and explanatory of the only point in the proofs of loss to which the defendant excepted, and, not being demanded under oath, we think the requisite of being verified by oath must be held to have been waived. Marthinson v. Insurance Co., 64 Mich. 372, 31 N. W. Rep. 291; Insurance Co. v. Kelly, 32 Md. 421; West v. Insurance Co., 27 Ohio St. 1; Ayres v. Insurance Co., 17 Iowa, 176. The part of Edward Lewis' evidence objected to was directly pertinent to the same point, and we think was clearly admissible. It amplified and explained fully William C. Lewis' *status* towards the insured property, the only apparent subject of contention between the parties as to the sufficiency of the proofs of loss; which explanation and correction of the proofs of loss, we think, was proper at the trial, and in accordance with law. Insurance Co. v. Huckberger, 52 Ill. 464; Insurance Co. v. Stevens, 48 Ill. 31; McMaster v. President, etc., 55 N. Y. 222; Hubbard v. Insurance Co., 33 Iowa, 325; Insurance Co. v. Schwenk, 94 U. S. 593; Maher v. Insurance Co., 67 N. Y. 283; Mosley v. Insurance Co., 55 Vt. 142; Willis v. Insurance Cos., 79 N. C. 285; May, Ins. § 465; 2 Pars. Cont. p. 461. The cases cited by the defendant's counsel in support of their contention all involved personal property, where the incoming partner was admitted to full partnership in the assets of the former firm, where those assets consisted entirely of personalty, and have no applicability to the question here.

The fifth assignment of error, we think, is well taken. The whereabouts of T. J. Rawls, or the question as to whether he was alive or dead, could not have any relevancy to any issue in this case; and we are at a loss to understand the object of the inquiry as to his whereabouts, unless it be, as is contended by defendant's counsel, an effort to make admissible as evidence at the trial an estimate of the items and cost of replacing the destroyed property, purporting to have been made by T. J. Rawls, deceased. Even for this purpose we do not think the inquiry as to his whereabouts was pertinent or proper, as the fact of his decease did not render any estimate on the subject made by him admissible evidence. Had he been alive, his estimate, to be proper evidence, would have to be verified by his oath; and the fact of his decease did not render his unverified estimate, made while in life, any more competent as evidence than if the same had been offered during his life-time.

The sixth assignment of error is well taken, and is fatal to the verdict and judgment in this cause. Incorporated in the policy sued upon, as one of the covenants therein, is the following provision: "In case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to arbitrators, indifferently chosen, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the companies, respectively, under this policy." In pursuance of this provision, the insurers and insured, after the loss, entered into the following agreement in writing for submission of the sole question of "amount" of loss to two builders or arbitrators:

"New York Underwriters' Agency, composed of the Germania and Hanover Fire Insurance Companies, of New York. Special agreement for submission to two builders. It is hereby agreed by B. C. Lewis & Sons, of the first part, and the Germania and Hanover Fire Insurance Companies, of the city of New York, of the second part, (each acting for itself,) that B. F. Langley and T. J. Rawls, together with a third party to be chosen by them, if necessary, shall appraise and estimate at the true cash value the damage by fire on the 2d day of January, 1885, to the property belonging to B. C. Lewis & Sons, as specified below, which appraisement and estimate by them, or any two of them, in writing, as to the amount of such loss or damage, shall be binding on both parties; it being understood that this appointment is without reference to any other question or matters of difference within the terms and conditions of the insurance, and is of binding effect only so far as regards the actual cash value of or damage to such property covered by policy No. 20,195 of said companies, issued

at the Tallahassee, Fla., agency. The property on which damage is to be estimated and appraised is the 2½-story frame building, with shingle roof, situate about seven miles north-east from Tallahassee, known as the 'Glenwood Property.' And it is expressly understood and agreed that said builders are to take into consideration the age, condition, and location of said premises previous to the fire, and also the value of the walls, material, or any portion of said building, saved; and after making an estimate of the cost of replacing said building a proper deduction shall be made by them for the difference (if any) between the value of a new or replaced building and the one insured. Said builders are hereby directed to exclude from the amount of damage any sum for previous depreciation from age, location, ordinary use, or any cause whatever, and simply to arrive at the damage actually caused by said fire. Witness our hands at Tallahassee, Fla., this 10th day of April, 1885.

[Signed] "B. C. LEWIS & SONS.
["] "GERMANIA & HANOVER FIRE INS. COS.,
"Per CHAS. C. FLEMING, Spl. Agt."

Then follows the oath of the said two builders, as follows:

"Declaration of Builders. State of Florida, county of Leon—ss.: We, the undersigned, do solemnly swear that we will act with strict impartiality in making an appraisement and estimate of the actual damage to the property of B. C. Lewis & Sons, insured by the Germania & Hanover Fire Insurance Companies, of New York, agreeable to the foregoing appointment, and that we will return to said company a true, just, and conscientious appraisement and estimate of damage on the same, according to the best of our knowledge, skill, and judgment. Witness our hands this 10th day of April, A. D. 1885.

[Signed] "B. F. LANGLEY,
["] "T. J. RAWLS.

"Subscribed and sworn before me this 11th day of April, A. D. 1885.

[Signed] "W. C. LEWIS,
"Notary Public."

Then follow the findings or award, signed by one of said builders and an umpire alleged to have been selected by them, to-wit:

"Award of Builders. To the Germania and Hanover Fire Insurance Companies, of New York: Having carefully estimated and appraised the damage by fire to the property of B. C. Lewis & Sons, agreeably to the foregoing appointment, we hereby report that, after having taken into consideration the age, condition, and location of the premises previous to the fire, and making proper deductions for the walls, materials, and portions of building saved, we have appraised and determined the damage to be four thousand one hundred and seventy-two 75-100 dollars, ($4,172.75.) Witness our hands this 11th day of April, 1885.

[Signed] "B. F. LANGLEY.
["] "J. M. WILSON."

This submission to arbitration and the award that followed were specifically set up as a special defense by the fifth plea of the defendant. This plea was demurred to by the plaintiffs, and the demurrer was overruled by the court, and the plea sustained as a valid defense; yet, afterwards, on the trial, when the defendant sought to substantiate its plea by introducing the agreement of submission and the award in evidence, its admission was refused by the court, unless it should also offer to introduce evidence that the amount awarded had been paid or tendered by the defendant to the plaintiffs, and this, too, after a replication to this plea had been held by the court to be bad, that contended for payment or tender of the amount awarded before the award could be available as a defense.

Ever since the decision in 1853 in the house of lords, by COLERIDGE, J., of Avery v. Scott, 8 Exch. 499, it has been uniformly held in England and in this country that provisions like this in a policy of insurance for the ascertainment and settlement of the amount of loss or damage by submission to arbitrators are proper, legal, and binding on the parties, and do not fall within that class of arbitraments that undertake to oust the courts of their jurisdiction, and that are therefore obnoxious to the law. Wolf v. Insurance Co., 50 N. J. Law, 453, 14 Atl. Rep. 561; Gauche v. Insurance Co., 4 Woods, 102, 10 Fed. Rep. 347; Adams v. Insurance Co., 70 Cal. 198, 11 Pac. Rep. 627; Trott v. Insurance Co., 1 Cliff. 439; Zallee v. Insurance Co., 44 Mo. 530,—in which it is held that such a submission is not, in the accepted legal sense of the term, a submission to arbitration, but merely an appraisal, and that it was not necessary to have the appraisers sworn. Elliott v. Assurance Co., L. R. 2 Exch. 237; Howard v. Railroad Co., 24 Fla. 560, 5 South. Rep. 356. The parties in this case, in pursuance of this valid and binding provision in the policy here sued on, entered into a solemn written compact submitting the matter of the "amount" of the loss or damage to two arbitrators or appraisers of their own choosing, with power in them to choose a third as umpire in case of their failure to agree. The appraisers thus chosen have awarded or fixed the amount of the loss at $4,172.75. Why the assured are not bound by their agreement of submission and this award that followed we cannot comprehend from anything exhibited in the record. It is true that promptly after the rendition of the award they notified the insurers of their determination not to abide the same; but parties cannot thus arbitrarily rid themselves of the binding force and effect of their solemn contracts. By this award they were bound, and to the amount awarded were they limited in their right to recover, unless they could have shown under proper pleading such fraud or other matter as would in law have avoided the same. Burchell v. Marsh, 17 How. 344. In the record here there is not one *sciatilla* of evidence even tending or attempting to show either irregularity, unfairness, or fraud in the procurement of this submission or in its conduct or result, and we must, consequently, hold that, in the absence of any such circumstances to avoid it, it is bind-

ing as to the extent of the loss on the assured as well as upon the insurers. Such submission does not come within the catalogue of arbitraments provided for in our statute, (McClel. Dig. p. 105 et seq.,) and need not have been conducted in accordance with the statute. Neither was it necessary that the award of the appraisers, touching such special question submitted to them, should have been accepted or acted upon in any way by the respective parties; neither was the agreement to submit such special question to arbitration a unilateral undertaking binding only on one of the parties thereto; because, upon the face of that covenant, in the policy sued upon that makes provisions for the appraisement of the amount of the loss, and also in the subsequent agreement submitting said special question to two builders, it is expressly stipulated that the findings of such arbitrators as to the amount of the damage should be binding on both parties. Hence, if, after such ascertainment of the amount of the loss, it should be found that the insurers were legally liable for such loss, they at once became bound for the "amount" ascertained and awarded by such arbitrators. The fact that the amount thus fixed by the arbitrators was not paid or tendered has nothing to do with the question whatever. Both in the policy and in the subsequent submission to the appraisers the liability of the insurers was expressly excepted and reserved from the consideration of said arbitrators. The naked question submitted to them was: What is the amount of the damage here? Whether the insurers were legally liable, or obligated to pay that loss, was not submitted to them, and did not enter into their sphere of inquiry, nor into their award, and depended upon the settlement of divers other independent circumstances and conditions growing out of the contract between the parties. As before stated, the refusal of the court below to admit in evidence this agreement for submission to arbitration and the resultant award, under the objection apparently urged, was fatally erroneous. By that award, until avoided in some legally recognized way, each one of the underwriting companies, in the event of their legal liability for the loss, was obligated for one-half part of the amount thereof, $4,172.75. But one of the companies is sued here, and the verdict against it is for $3,000, which we find to be considerably in excess of one-half part of the amount of the award, by which the parties were bound, and to which they were limited in a recovery.

The seventh assignment of error is the giving of each and every of the instructions given by the court to the jury of the court's own motion, and those requested by the plaintiffs, but in the briefs of counsel this assignment seems to have been abandoned, except as to the instruction lettered "E," which is as follows: "The letter of the defendant acknowledges receipt of proofs of loss as of May 20, 1885. The interest, then, in the event of your finding for the plaintiffs, begins to run from July 20, 1885." This instruction, we think, was erroneous. It dealt too strongly with the facts, and supplied in reality a fact itself; that is, the exact date from which interest began to accumulate in the event of a recovery by the plaintiffs. The jury are the sole judges of facts, and they alone determine the establishment or non-establishment of every material fact in a cause. Had this instruction directed them that the plaintiffs were entitled to interest, in the event of their recovering, upon the amount of the recovery from a date 60 days after the furnishing of proofs of loss, and left it to the jury to determine whether proofs of loss had been furnished or not, and when, it would have been a proper charge. But, in view of the absence of any conflict of evidence as to the time when the defendant received the proofs of loss, we do not think the giving of this charge could be held to be reversible error. The other instructions given and excepted to counsel have ignored in their briefs, and consequently we will treat them as abandoned.

The eighth assignment of error is the refusal of the court to give nine instructions requested by the defendant. After what has been said upon the various questions arising in this case we do not deem it necessary to discuss this assignment further than to say that the court below, upon another trial, can conform its rulings upon the questions raised by said refused instructions to the views and opinions herein expressed.

The ninth assignment of error, the refusal to grant a new trial, it follows from what has been said, must be sustained. A new trial should have been granted.

The judgment of the court below is reversed, with instructions that a new trial be awarded.

(43 La. Ann. 1118)

REYNOLDS v. REYNOLDS *et al.* (No. 10,863.)

(*Supreme Court of Louisiana.* Nov. 16, 1891. 43 La. Ann.)

PARTITION—RIGHT TO DEMAND—APPEAL—WAIVER.

1. The right of co-owners of property to demand a partition thereof is absolute, and, where the co-ownership is admitted, appeal does not lie from a simple decree of partition.

2. When, besides admitting co-ownership, the parties have consented to the method and terms of partition fixed in the decree, they had nothing left subject to appeal.

(*Syllabus by the Court.*)

Appeal from civil district court, parish of Orleans; NICHOLAS H. RIGHTOR, Judge.

Suit by Mary Reynolds against William Reynolds and others for partition. Decree for plaintiff. Defendants appeal. Dismissed.

A. L. Tissot and *E. J. Meral*, for appellants. *Joseph Brewer, Gilbert L. Hall*, and *Farrar, Jones & Kruttschnitt*, for appellee.

ON MOTION TO DISMISS.

FENNER, J. The motion is based on two grounds, viz.: (1) That the judgments are interlocutory, and not in their nature appealable; (2) that they were rendered by consent of appellants. The record discloses a simple suit for partition, by one owner against her co-owners, of certain designated property held in common be-