Coram:
AMES-HOFF, J.
JORIS-SEN, J.
ESSER, J.

J. A. FUCHS AND ANNIE FUCHS

v.

THE NEW ZEALAND INSURANCE COMPANY.

1897

20 *September.*

POLICY OF INSURANCE—ARBITRATION CLAUSE—CONDITION PRECEDENT—INCORPORATED COMPANY—SUMMONS.

Where an action was brought on an insurance policy containing a clause that any dispute arising under the policy with regard to any claim for loss should be submitted to the decision of arbitrators, and the defendant company raised the exception that no reason was alleged in the summons why the plaintiff was not bound first to submit the matter to the decision of arbitrators: Held, *that the exception was well taken.* (*Cf.* N. S. A. Rail. Co. *v.* New Primrose G. M. Co., Ltd., ante, *p.* 111.)

Where a company is sued, the summons must state whether the company is incorporated in this State or not.

THIS was an argument on exception. The plaintiffs sued the defendant for the payment of the sum of 849*l.* 10*s.* The summons alleged that the plaintiffs had on 8th March, 1897, effected a policy of insurance with the defendant company, whereby certain furniture, glassware, clothing, &c. in a certain house in Proes Street, Pretoria, occupied by the plaintiffs, were insured with the company for the sum of 1,475*l.* against loss or damage by fire: that on the 2nd April, 1897, a fire occurred, without the fault or knowledge of the plaintiffs, whereby the articles insured were destroyed and damaged to a great extent: that the amount of loss sustained by the plaintiffs amounted to the sum of 849*l.* 10*s.*, and that all times had elapsed and all conditions been fulfilled entitling the plaintiffs to claim this amount from the defendant. The summons commenced as follows:—

> "Summon the New Zealand Insurance Company, an insurance company carrying on business at Pretoria and elsewhere in this State, &c."

The defendant excepted to the summons on the ground:

1st. That the defendant was sued as an incorporated company without any allegation being contained in the summons that the company was incorporated in this State or elsewhere.

2nd. That in Number 16 of the conditions of the policy of insurance annexed to the summons, it was provided that all disputes which might arise between the company and the assured should be submitted to arbitration, and the summons set forth no reason why the plaintiffs were not obliged first of all to submit the dispute existing between them and the defendant company to the decision of arbitrators.

Number 16 of the conditions was as follows: "In case any dispute should arise between the company and the assured with reference to any claim for loss or damage by fire, and there be no suspicion of fraud, such dispute shall be submitted to the decision of arbitrators chosen by the parties, whose award in writing or that of an umpire chosen by the arbitrators before the commencement of the arbitration shall be conclusive and binding on both parties."

In answer to the first exception, the plaintiffs put in certain correspondence between them and the local manager of the defendant company, in order to show that he had agreed to accept service of summons on behalf of the company.

Jacobs, for the plaintiffs: We have sued in the name stated in the policy of the company. The manager of the company intimated to us that he would accept service of the summons. It is not necessary to allege that the company is not incorporated in this country. Condition No. 16 of the policy is not applicable in the present instance. A criminal prosecution for arson had been instituted against the plaintiffs. There was, therefore, a suspicion of fraud against us, and consequently we were not obliged to go to arbitration. The summons alleges that all conditions have been performed entitling us to come to the Court. That we will prove.

Esselen, for the defendant: The form in the summons is that of an incorporated company. It was not necessary to ask whether the manager would accept service of the summons. (See *Law No.* 12, 1892, § 8.)

AMESHOFF, J.: I am of opinion that both exceptions are well taken and must be allowed with costs. Leave will, however, be given to amend the summons.

1897

FUCHS v. NEW ZEALAND INSURANCE CO.

Jorissen, J.

JORISSEN, J., also considered both exceptions to be good, but that no leave should be given to amend the summons.

ESSER, J.: The first exception must be allowed, but without costs, for the defendant company through its correspondence led the plaintiffs to believe that it would accept service of the summons, and further because the exception is badly drawn where it speaks of "incorporated." The second exception is good and should be allowed with costs. It was the duty of the plaintiffs to make precise allegations with regard to clause 16 of the policy, for *primâ facie* the Court at present has no jurisdiction. The usual clause in regard to conditions having been fulfilled is not sufficient. In both instances, however, leave must be given to amend the summons.

Attorney for the plaintiffs: *J. Berrangé.*

Attorneys for the defendant: *Stegmann* and *Esselen.*

CARY AND U'REN *v.* TRIGGS.

Coram: AMES-HOFF, J. JORIS-SEN, J. ESSER, J.

1897

23 *September.*

EXCEPTION—ARBITRATION CLAUSE.

Where the parties entered into a deed of partnership to carry on business together, for which purpose each of the partners would contribute a certain sum, and the deed provided that all questions between the partners relating to matters in connection with the business to be carried on by them, or in regard to any interpretation of the deed itself, should be submitted to arbitration, on one of the parties being sued for the paying in of his contribution, and his excepting that the amount to be contributed by him had been partly paid, and that the matter ought to have been submitted to arbitration: Held, *that the exception was well taken.*

THIS was an exception against a summons by reason of the action having been instituted notwithstanding one of the clauses of the agreement entered into by the parties provided that all matters relating to the business carried on by the parties or in regard to the reading and interpretation of the agreement should be decided by arbitration. The plaintiffs sued the defendant for the payment of 600*l.* on the following grounds: They alleged that a partnership had been entered into by written agreement between them and the defendant; that each of the partners would contribute