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

600*l.*; that they (the plaintiffs) had paid in their share but that the defendant refused to do so. The defendant took three exceptions against the summons, to wit:—(1) That the money was not due, as appeared from a letter of demand written by the plaintiffs' attorneys, which merely asked for the payment of 241*l.* 8*s.* 11*d.*; (2) that the settlement of this dispute should be determined by arbitration, according to Clause 19 of the deed of partnership, which reads as follows: "If any dispute or difference shall arise between the said partners with regard to any matter or thing in connection with the business to be carried on by them, or the reading or construction of anything herein contained, the same shall be referred to arbitration in the usual manner, and the decision of the arbitrators or their umpire shall be binding upon all parties"; (3) that the partnership between the plaintiffs and defendant still existed, and that, therefore, he could not be sued by them in this matter.

Curlewis, for the excipient (defendant): The parties must go to arbitration.

Maasdorp, for the plaintiffs: The first exception, that the sum of 600*l.* is not due, is a plea to the summons and not an exception. With regard to the second exception, the Court will not presume that one of the parties has deprived himself of the right of coming to the Court. (*Davis* v. *South British Insurance Co.*, 3 *Juta*, 416.) Our agreement says "in connection with the business," but this action has nothing to do with the business itself. We are suing for the contribution of 600*l.* The Court must interpret the arbitration clause strictly. In regard to the third exception, it is foolish to contend that partners cannot come to the Court. (*Voet*, 17, 2. 9; *Grotius*, 3, 21. 7; *Van der Linden*, 4, 1. 13; *Jacobsohn* v. *Norton*, 2 *Menz. p.* 218; *Norton's Trustees* v. *Norden's Trustees*, 3 *Menz.* 320.)

Curlewis, in reply: The first and second exceptions are in reality one exception. The first contains the reasons for taking the second.

The Court allowed the second exception, with costs.

Attorney for excipient: *J. H. L. Findlay.*

Attorneys for the plaintiffs: *Roux* and *Ballot.*