any moneyed value. Such a claim would be fatal to the relief he asks, because it would show that it is a proper case for a writ of error, and therefore a mandamus will not lie.

We have repeatedly held that the writ of mandamus cannot be made to perform the functions of a writ of error.

In the recent case of the *Commissioner* v. *Whiteley*,* the following language was used without dissent: "The principles of the law relating to the remedy by mandamus are well settled. It lies when there is a refusal to perform a ministerial act involving no exercise of judgment or discretion. . . . . It lies when the exercise of judgment and discretion are involved, and the officer refuses to decide, *provided that if he decided, the aggrieved party could have his decision reviewed by another tribunal.* . . . It is applicable only in these two classes of cases. It cannot be made to perform the functions of a writ of error."

And to the same purpose are *Ex parte Hoyt*† and *Ex parte Taylor*.‡

Mr. Justice SWAYNE, not having heard the argument, took no part in the judgment.

RIDDLESBARGER *v.* HARTFORD INSURANCE COMPANY.

1. A condition in a policy of fire insurance that no action against the insurers, for the recovery of any claim upon the policy, shall be sustained, unless commenced within twelve months after the loss shall have occurred, and that the lapse of this period shall be conclusive evidence against the validity of any claim asserted, if an action for its enforcement be subsequently commenced, is not against the policy of the statute of limitations, and is valid.
2. The action mentioned in the condition which must be commenced within the twelve months, is the one which is prosecuted to judgment. The failure of a previous action from any cause cannot alter the case; although such previous action was commenced within the period prescribed.

ERROR to the Circuit Court for Missouri.

This was an action against the Hartford Insurance Com-

* 4 Wallace, 524. † 13 Peters, 279. ‡ 14 Howard, 3.

pany, upon a policy of insurance in the sum of five thousand dollars, issued by the said company, a corporation created under the laws of Connecticut, to the plaintiff, upon a brick building, belonging to him, situated in Kansas City, in the State of Missouri. The policy bore date on the first of June, 1861, and was for one year. The building was destroyed by fire in March, 1862, and in June following the plaintiff brought an action for the loss sustained in the Kansas City Court of Common Pleas, in the county of Jackson in that State. To this action the defendant appeared and answered to the merits, and the cause continued in that court until June, 1864, when it was dismissed by the plaintiff. Within one year after this dismissal the present action was commenced in the Court of Common Pleas in the County of St. Louis, from which it was transferred to the Circuit Court of the United States for the District of Missouri.

The policy contained the following condition:

"That no suit or action of any kind against said company for the recovery of any claim upon, under, or by virtue of the said policy shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after the loss or damage shall occur, and in case any suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim thereby so attempted to be enforced."

To the present action the defendant pleaded this condition. The plaintiff replied the commencement of the first action in the Kansas City Court of Common Pleas within the year stipulated in the condition, and the commencement of the present action within one year after the dismissal of that action. To the replication the defendant demurred.

The statute of limitations of Missouri, after prescribing various periods of limitation for different actions, provides that if in any action commenced within the periods mentioned, the plaintiff shall "suffer a nonsuit," he may commence a new action within one year afterwards.

The Circuit Court sustained the demurrer, and rendered final judgment thereon for the defendant, and the plaintiff brought the case here by writ of error.

Mr. James Hughes, for the plaintiff in error.

I. Parties cannot by a contract agree upon a limitation different from the statutes within which suit shall be brought, or the right to sue be barred. This would be in conflict with the law and its policy. The point is so expressly ruled by McLean, J.,* and by the Supreme Court of Indiana which followed him.†

This is an attempt to bar or discharge a right of action before the right accrues. It is a well-settled principle, that a release can only operate upon an existing claim.‡

Why has a condition or agreement in a policy, providing that all disputes arising under it shall be referred to arbitration, been held to be void? Because it is an attempt to oust the jurisdiction of the courts.§

II. But if the limitation contract, as to the time of bringing the suit, is valid, and binds the plaintiff to commence his action within twelve months next after the loss occurred, then we insist that inasmuch as the plaintiff did commence his action against the defendant, within the time prescribed, viz., in June, 1862, in the Kansas City Court of Common Pleas, in Jackson County, Missouri, in which he sought to recover, for the same cause of action and none other, that he seeks to recover for in the present suit; to which action defendant appeared and filed an answer to the merits thereof; that said action was pending and undetermined in said court until June, 1864, when plaintiff suffered a nonsuit therein, and the present action was commenced in the St.

* French et al. *v.* Lafayette Insurance Company, 5 McLean, 463.

† Eagle Insurance Company *v.* Lafayette Insurance Company, 9 Indiana, 443.

‡ Coke Littleton, 265; Hastings *v.* Dickinson, 7 Massachusetts, 155; Gibson *v.* Gibson, 15 Id. 110.

§ Kill *v.* Hollister, 1 Wilson, 129; Allegre *v.* Insurance Company, 6 Harris & Johnson, 413.

Louis Court of Common Pleas, in July, 1864, within twelve months after the nonsuit was suffered; then plaintiff has complied with the condition in said contract according to, and in compliance with the then existing laws of Missouri, and is entitled to maintain the present action.*

The contract was made in the State of Missouri, and was made with reference to the then existing laws of that State.

That law became a part of the contract itself, and to that law we must look in giving a construction to the contract; and so far as the remedy is concerned, when suit is brought in that State to enforce a right growing out of that contract, the law of that State must alone govern and determine. The Revised Statutes of 1855 were in force when the contract was made, and so continued in force until after the commencement of this suit in the Common Pleas Court of St. Louis County.

The statute of limitations of that State enacts that actions of this kind shall be brought within five years next after the cause of action accrues, provided that if any action be commenced within the time prescribed, and the plaintiff therein "suffer a nonsuit," such plaintiff may commence a new action, within one year from the time of such nonsuit suffered.

Mr. R. D. Hubbard, contra.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

By the demurrer to the replication two questions are presented for our determination: *First;* whether the condition against the maintenance of any action to recover a claim upon the policy, unless commenced within twelve months after the loss, is valid; and *Second;* whether if valid, the condition was complied with in the present case under the statute of limitations of Missouri.

The objection to the condition is founded upon the notion that the limitation it prescribes contravenes the policy of the

* Haymaker *v.* Haymaker, 4 Ohio State, 272.

statute of limitations. This notion arises from a misconception of the nature and object of statutes of this character. They do not confer any right of action. They are enacted to restrict the period within which the right, otherwise unlimited, might be asserted. They are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth. The policy of these statutes is to encourage promptitude in the prosecution of remedies. They prescribe what is supposed to be a reasonable period for this purpose, but there is nothing in their language or object which inhibits parties from stipulating for a shorter period within which to assert their respective claims. It is clearly for the interest of insurance companies that the extent of losses sustained by them should be speedily ascertained, and it is equally for the interest of the assured that the loss should be speedily adjusted and paid. The conditions in policies requiring notice of the loss to be given, and proofs of the amount to be furnished the insurers within certain prescribed periods, must be strictly complied with to enable the assured to recover. And it is not perceived that the condition under consideration stands upon any different footing. The contract of insurance is a voluntary one, and the insurers have a right to designate the terms upon which they will be responsible for losses. And it is not an unreasonable term that in case of a controversy upon a loss resort shall be had by the assured to the proper tribunal, whilst the transaction is recent, and the proofs respecting it are accessible.

A stipulation in a policy to refer all disputes to arbitration stands upon a different footing. That is held invalid,

because it is an attempt to oust the courts of jurisdiction by excluding the assured from all resort to them for his remedy. That is a very different matter from prescribing a period within which such resort shall be had. The condition in the policy in this case does not interfere with the authority of the courts; it simply exacts promptitude on the part of the assured in the prosecution of his legal remedies, in case a loss is sustained respecting which a controversy arises between the parties.

The statute of Missouri, which allows a party who "suffers a nonsuit" in an action to bring a new action for the same cause within one year afterwards, does not affect the rights of the parties in this case. In the first place, the statute only applies to cases of involuntary nonsuit, not to cases where the plaintiff of his own motion dismisses the action. It was only intended to cover cases of accidental miscarriage, as from defect in the proofs, or in the parties or pleadings, and like particulars. In the second place, the rights of the parties flow from the contract. That relieves them from the general limitations of the statute, and, as a consequence, from its exceptions also.

The action mentioned, which must be commenced within the twelve months, is the one which is prosecuted to judgment. The failure of a previous action from any cause cannot alter the case. The contract declares that an action shall not be sustained, unless *such* action, not some previous action, shall be commenced within the period designated. It makes no provision for any exception in the event of the failure of an action commenced, and the court cannot insert one without changing the contract.

The questions presented in this case, though new to this court, are not new to the country. The validity of the limitation stipulated in conditions similar to the one in the case at bar, has been elaborately considered in the highest courts of several of the States,* and has been sustained in all of

* Peoria Insurance Company *v.* Whitehill, 25 Illinois, 466; Williams *v.* Mutual Insurance Company, 20 Vermont, 222; Wilson *v.* Ætna Insurance Company, 27 Id. 99; N. W. Insurance Company *v.* Phœnix Oil Co., 31

them, except in the Supreme Court of Indiana,* which followed an adverse decision of Mr. Justice McLean in the Circuit Court for the district of that State.† Its validity has also been sustained by Mr. Justice Nelson in the Circuit Court for the District of Connecticut.‡

We have no doubt of its validity. The commencement, therefore, of the present action within the period designated was a condition essential to the plaintiff's recovery; and this condition was not affected by the fact that the action, which was dismissed, had been commenced within that period.

JUDGMENT AFFIRMED.

RAILROAD COMPANY *v.* HOWARD.

1. Under the laws of Iowa, a railroad company, having power to issue its own bonds in order to make its road, may guaranty the bonds of cities and counties which have been lawfully issued, and are used as the means of accomplishing the same end.
2. A sale under foreclosure of mortgage of an insolvent railroad company, expedited and made advantageous by an arrangement between the mortgagees and the *stockholders*, under which arrangement the mortgagees, according to their order, got more or less of their debt (100 to 30 per cent.), and the stockholders of the company the residue of the proceeds —a fraction (16 per cent.) of the par of their stock—held fraudulent as against general creditors not secured by the mortgage, and this although the road was mortgaged far above its value, and on a sale in open market did not bring near enough to pay even the mortgage debts; so

---

Pennsylvania State, 449; Brown and Wife *v.* Savannah Insurance Company, 24 Georgia, 101; Portage Insurance Company *v.* West, 6 Ohio State, 602; Amesbury *v.* Bowditch Insurance Company, 6 Gray, 603; Fullam *v.* New York Insurance Company, 7 Gray, 61; Carter *v.* Humboldt, 12 Iowa, 287; Stout *v.* City Insurance Company, Id. 371; Ripley *v.* Ætna Insurance Company, 29 Barbour, 552; Gooden *v.* Amoskeag Company, 20 New Hampshire, 73; Brown *v.* Roger Williams Company, 5 Rhode Island, 394; Brown *v.* Roger Williams Company, 7 Id. 301; Ames *v.* New York Insurance Company, 4 Kernan, 253.

* The Eagle Insurance Company *v.* Lafayette Insurance Company, 9 Indiana, 443.

† French *v.* Lafayette Insurance Company, 5 McLean, 461.

‡ Cray *v.* Hartford Insurance Company, 1 Blatchford, 280.