

PORTER v. DAVIDSON, Sheriff.

(Circuit Court of Appeals, Fourth Circuit. May 28, 1895.)

No. 109.

APPEAL—INTERLOCUTORY ORDER.

An order made in an action of claim and delivery, under the North Carolina Code, directing certain chattels which have been taken by the marshal from the possession of a sheriff, upon a requisition to replevy them, to be returned to such sheriff, is not a final order, and is not reviewable.

In Error to the Circuit Court of the United States for the Western District of North Carolina.

This was an action of claim and delivery by Henry Kirk Porter against L. W. Davidson, sheriff of Cherokee county, N. C. The circuit court made an order directing certain replevied chattels to be returned to the defendant. 62 Fed. 626. Plaintiff brings error. Affirmed.

Julius C. Martin, on brief for plaintiff in error.

R. L. Cooper and M. W. Bell appeared on record for defendant in error, but filed no brief, nor appeared to argue the case.

Before FULLER, Circuit Justice, GOFF, Circuit Judge, and SEYMOUR, District Judge.

SEYMOUR, District Judge. The plaintiff in error, who was also plaintiff below, is mortgagee of certain chattels in the possession of George Porter & Co., mortgagor, after condition broken. The defendant, the sheriff of Cherokee county in North Carolina, had seized and held the chattels under warrants of attachment issued out of the courts of North Carolina against the mortgagors. Pending the suits in which the attachments were issued, the plaintiffs in error brought their action of claim and delivery in the circuit court of the United States for the Western district of North Carolina, and, pursuing the state practice, they executed the proper undertaking; and the marshal of the circuit court took the chattels from the possession of the sheriff, and delivered them to the plaintiff. Thereupon the defendant below moved to dismiss the summons and complaint and the action. These motions the court denied, but ordered that the chattels taken by the marshal be returned to the defendant sheriff. Plaintiff, having duly excepted to this order, brings his writ of error to this court.

The learned judge who delivered the opinion of the circuit court assigned as the reason for his order the fact that the chattels in question had been seized by the sheriff by virtue of the process of the state court, and were therefore in the custody of that court, and not liable to be taken therefrom by process of the United States court. The order is evidently not a final decision of the cause, and is therefore not reviewable. As was stated in the opinion of the judge below:

"The proceeding of the plaintiff in this case, by which he took from the possession of the sheriff the chattels levied on, was ancillary,—not in any way

affecting the merits of the original case. That can go on without conflicting with any of the cases quoted above."

Appeal dismissed.

EVERSON v. EQUITABLE LIFE ASSUR. CO.

(Circuit Court, W. D. Pennsylvania. March 11, 1895.)

1. EQUITY JURISDICTION—BILL FOR DISCOVERY AND ACCOUNTING.

Where a bill seeks both discovery and an accounting, the discovery must be regarded, prima facie, as incidental to the accounting, and, if there is no right to an accounting, the bill will be held bad upon demurrer.

2. LIFE INSURANCE—SEMI-TONTINE POLICY—BILL FOR ACCOUNTING.

The relation between the holder of a matured semi-tontine policy and the insurance company is that of debtor and creditor merely, and involves no trust relation; and a policy holder who is dissatisfied with the amount of the surplus which is apportioned to him by the company, pursuant to the terms of the policy, cannot maintain a bill for accounting and discovery when there are no sufficient allegations of fraud.

This was a bill by T. Bissell Everson against the Equitable Life Assurance Company praying a discovery and accounting in respect to the amount due him under a matured semi-tontine life insurance policy. Defendant demurred to the bill.

Watson & McCleave, for complainant.

Willis F. McCook, for respondent.

BUFFINGTON. District Judge. On August 12, 1884, the respondent, the Equitable Life Assurance Company, a corporation created by the state of New York, issued a life insurance policy to the complainant, T. Bissell Everson, then and now a citizen and resident of Pennsylvania, for \$10,000. Certain provisions were made part of said policy, the ones pertinent to the present question being:

"First. That this policy is issued under the semi-tontine plan, the particulars of which are as follows: Second. That the tontine dividend period for this policy shall be completed on the 28th day of May, in the year eighteen hundred and ninety-four. Third. That no dividends shall be allowed or paid upon this policy unless the person whose life is hereby assured shall survive the completion of its tontine dividend period as aforesaid, and unless this policy shall be then in force. Fourth. That all surplus or profits derived from such policies on the semi-tontine plan as shall not be in force at the date of their completion of their respective tontine dividend periods shall be apportioned equitably among such policies as shall complete their tontine dividend period. Fifth. That upon the completion of the tontine dividend period, on May 28, 1894, provided this policy shall not have been terminated previously by lapse or death, said T. Bissell Everson shall have the option either, first, to withdraw in cash this policy's entire share of the assets; i. e., the accumulated reserve, which shall be twelve hundred and thirty-one and ten one-hundredth dollars, and, in addition thereto, the surplus apportioned by this society to this policy; secondly," etc.

That by this contract of insurance the relation created between the parties was that of debtor and creditor is firmly established by numerous authorities. Uhlman v. Insurance Co., 109 N. Y. 421, 17 N. E. 363; Hunton v. Assurance Co., 45 Fed. 661; People v. Security Life Ins. & Annuity Co., 78 N. Y. 114; Bewley v. Society, 61 How. Prac. 344; Bogardus v. Insurance Co., 101 N. Y. 328, 4 N. E. 522;