COMMERCIAL TRAVELERS' MUT. ACC. ASS'N OF AMERICA v. FULTON et al.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 28.

1. APPEAL—REVIEW.
That the appellate court may be inclined to a conclusion different from that expressed by the jury in their verdict is no ground for disturbing it, if there is evidence sufficient to warrant the court in sending the case to the jury.

2. ACCIDENT INSURANCE—CAUSE OF DEATH—QUESTION FOR JURY.
In an action to recover on an accident policy, the evidence showed that insured suddenly fell, striking on a water spout, which left external marks on his head and face, and that he died a few minutes thereafter. It appeared that deceased was troubled with disease of the heart. Certain physicians testified that the phenomena attending deceased's death were characteristic rather of an injury to the brain, than heart disease; and one expert testified that the injuries to the head and brain described by the evidence would have been sufficient to cause death even in the case of a healthy heart. *Held* sufficient to take the case to the jury.

3. HARMLESS ERROR—EVIDENCE.
Error in allowing an expert witness to testify as to his opinion, based upon the facts included in the hypothetical question, and on reading the evidence in a former trial, was harmless, where, on an extended examination, there could be no doubt in the jury's mind that the professional opinion of the witness was based on the facts involved or testified to on the second trial.

4. OBJECTIONS WAIVED.
An exception to a refusal to dismiss the complaint at the close of plaintiff's case was waived when defendant put in his own evidence.

5. TRIAL—RECEPTION OF EVIDENCE.
Permission to plaintiff to examine expert witnesses after defendant has rested is within the discretion of the trial judge.

In Error to the Circuit Court of the United States for the Northern District of New York.

This cause comes here upon a writ of error to review a judgment of the circuit court, Northern district of New York, entered upon the verdict of a jury in favor of defendants in error, who were plaintiffs below. The action was brought by beneficiaries under a policy of insurance, to recover $5,000 for the death of Thomas K. Fulton. The cause has been twice tried. The opinion of this court reviewing the first trial will be found reported in 24 C. C. A. 654, and 79 Fed. 423.

W. A. Matteson, for plaintiff in error.

Chas. A. Talcott, for defendants in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Reference may be had to our former opinion for an elaborate analysis of the contract. It is sufficient here to state that the conclusion then reached, and still adhered to, was that if the assured under such policy sustained an accident, but "at the time it occurred he was suffering from a pre-existing disease or bodily infirmity, and if the accident would not have caused the death if he had not been affected with the disease or infirmity, but he died because the accident aggravated the disease, or the disease aggravated the

effects of the accident," there could be no recovery. On January 1, 1895, the insured, a man weighing from 180 to 190 pounds, while on the sidewalk, waiting for a street car, suddenly fell, striking upon an iron water spout which projected a few inches above the sidewalk, and which left external, visible marks upon his head and face, in the form of abrasions or bruises, not supposed at the time to be of a serious character. He died from 15 to 20 minutes after the accident, and was buried without any careful examination into the cause of death. Three months after interment the body was exhumed and an autopsy made. It is not disputed that, at the time of his fall, Fulton was affected with a diseased heart. The primary question in the case is whether the fall produced such an effect upon the brain that he died in consequence of the blow thus received, or whether the fall caused his death only by producing such an acute aggravation of the disease of his heart that he died, when a man with a reasonably healthy heart would have lived. The medical testimony is voluminous, and we have carefully examined it. That we may be inclined to a conclusion thereon differing from that expressed by the jury in their verdict is no ground for disturbing such verdict, if there can be found anywhere in the record evidence sufficient to warrant the court in sending the case to the jury. That there was sufficient to take the case to them, we have no doubt. Two, at least, of the physicians testified that, in their opinion, death was caused by an injury to the brain; such opinion being founded in part upon the assumption in the hypothetical question, which elicited such opinion, that immediately after the fall Fulton "was unconscious, only exclaiming, 'Oh!' as he was turned over; breathing hard, as if he was blowing something, and with a rattling noise; his face not pale, but fresh-looking; and died within fifteen minutes to half an hour, without having regained consciousness." These phenomena, they testify, are characteristic rather of a death from injury to the brain than from heart disease. It is true that when, upon cross-examination, the condition of deceased's heart was disclosed to them, they both concede that the organic disease of the heart may have had something to do with the death; but one of them, at least, at the very close of his testimony, testified that the injuries to the head and brain described in the narrative of the post mortem would have been sufficient to cause death, even in the case of a healthy heart. In view of this evidence, and of the testimony of those who saw him fall, and picked him up, that his condition, as to color, breathing, and apparent unconsciousness, was such as is described in the hypothetical question, it would have been error to direct a verdict for defendant.

Certain exceptions to the admission or exclusion of evidence have been presented on the argument, and may be briefly disposed of:

Plaintiffs, as part of their prima facie case, called a doctor, to whom they put a hypothetical question, which was objected to on the ground that "certain facts proven are omitted from the question, and certain other facts not proven are included in the question." The witness answered it, stating that he believed death resulted from some injury to the brain. In reply to the very next question, on cross-examination, he stated that this opinion was based upon the facts included in the

hypothetical question, "and upon reading the evidence in the former trial." Defendant's counsel thereupon moved that the answer expressing his opinion be stricken out, upon the ground that it was based upon some record he had read, as well as upon the question put to him. The motion was denied. Manifestly, this was error. The jury knew nothing about the evidence in the former trial. There was therefore nothing to indicate to them upon what assumed facts the witness predicated his opinion, nor whether his assumptions as to such facts were warranted by the evidence or not. We are of the opinion, however, that the error was harmless. The same witness was recalled in rebuttal, and an extended direct and cross examination fully displayed the grounds upon which he based the opinion, which he reiterated. There could have been no doubt in the jury's mind that the witness' professional opinions were based upon the facts proved or testified to on the second trial. For a similar reason, it will not be necessary to discuss the objections to various other hypothetical questions. All the experts were subjected to such extended examinations that their opinions, under every hypothesis possible under the testimony, were elicited.

The exception reserved to the refusal to dismiss the complaint at close of plaintiffs' case was waived when defendant put in its own evidence. The exception to exclusion of part of an answer by Dr. Boggs, examined on commission, is unsound. The part excluded was hearsay. The questions put to the same witness as to his own statements made in the death certificate were objectionable in form, inasmuch as they assumed the existence of a document not proved; but the witness' answers showed precisely what statements he did include in that document, and it was legitimate cross-examination to ascertain what statements the witness had made on the subject out of court. The permission accorded to the plaintiffs to examine expert witnesses after defendant had rested, in the peculiar circumstances of this case, was within the discretion of the trial judge.

Of the remaining exceptions to rulings upon questions of evidence, some have been covered by what has been said as to hypothetical questions, some refer to matters within the discretion of the court, and the remainder are either unsound, or trivial and unimportant.

A number of exceptions were reserved as to the charge, and as to refusals to charge. None of them need be discussed. The charge most carefully conformed to the opinion of this court upon the first appeal, and could have left no doubt in the jury's mind as to what it was necessary to find in order to give plaintiffs a verdict. That their finding in favor of the plaintiffs was, as defendant contends, against the weight of evidence, is a matter not open for discussion here. The judgment of the circuit court is affirmed.

SARRAZIN v. W. R. IRBY CIGAR & TOBACCO CO., Limited.

(Circuit Court of Appeals, Fifth Circuit. April 11, 1899.)

No. 788.

1. JUDGMENT AS EVIDENCE—PROOF OF ASSIGNMENT IN INSOLVENCY.
Under the law of Louisiana, a judgment accepting a cession of a debtor's property in insolvency proceedings is final, and can only be set aside by an appeal, or in an action of nullity.

2. EVIDENCE—ADMISSIBILITY OF PART OF JUDICIAL RECORD.
It is the settled rule in Louisiana that the production of the entire record in insolvency proceedings is unnecessary, where it is sought only to prove a single fact, or a certain part of such proceedings.

3. GENERAL ASSIGNMENT BY INSOLVENT—PROPERTY INCLUDED.
The insolvency law of Louisiana requires the cession of all the property of a debtor seeking to avail himself of its provisions; and an acceptance of such cession by the court vests all the debtor's property in his creditors, whether enumerated in his schedule, or whether he so intended, or not. Such a cession and an acceptance carry with them the property in a trade-mark, unless it is strictly personal, so as not to be assignable.

4. TRADE-MARKS—ASSIGNABILITY.
A registered trade-mark for a brand of smoking tobacco, the only essential feature of which is the name of the brand, is not personal to the individual registering it, but may be transferred.

5. SAME—REGISTRY ACT—EFFECT ON TRANSFER.
The registry of a trade-mark under the act of March 3, 1881, confers no property rights similar to those acquired under the patent or copyright laws, which are grants by the United States, but merely brings pre-existing rights which the proprietor may have at common law within the cognizance of federal courts in cases wherein it is alleged in the pleadings that such trade-mark is used in connection with commerce with foreign countries or Indian tribes; otherwise, suits relating to trade-marks, whether registered or not, involve no federal question; nor does their registry bring them within the provisions of the patent laws, as to the formalities required for their transfer.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

This action was brought by Cheri E. Sarrazin, a citizen of Mississippi, against the W. R. Irby Cigar & Tobacco Company, Limited, a corporation organized under the laws of the state of Louisiana, and domiciled in the city of New Orleans, to recover damages for the alleged infringement of a trade-mark ("King Bee," etc.) for smoking tobacco. The infringement is alleged to have been committed in the years 1896, 1897, and 1898. The plaintiff avers in his petition that he registered his said trade-mark in the United States patent office as provided by the act of congress of March 3, 1881, and that on the 14th day of December, 1886, a certificate of registry was issued to him. It is further averred that, prior to and since the registration of said trade-mark, he has been placing the same upon smoking tobacco and cigarettes, which have a well-known reputation and sale through the United States and Mexico and Central America. The location of the defendant's infringement is nowhere set forth in the petition, except in giving the domicile of the defendant corporation in the city of New Orleans, and there is no averment that the defendant corporation has ever infringed the said trade-mark in trade and commerce with Indian tribes or in foreign countries. The defendant filed three exceptions to the plaintiff's demand, as follows: "(1) This honorable court is without jurisdiction, as a court of law, to hear and determine the case made by plaintiff, and that this action must be dismissed for want of jurisdiction. (2) That the plaintiff's petition fails to disclose any cause of action