HADDEN et al. v. DOOLEY et al.

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

No. 25.

On rehearing. For former opinion, see 92 Fed. 274.

Henry B. Twombly, for appellants.
Edward W. Paige, for appellees.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The contention of the appellees upon the rehearing is that the statement of facts in regard to the service of the Hadden attachment on May 21, 1895, was not sustained by the testimony, and that it did not appear when the warrant was delivered to the sheriff, or that any one but the appellants knew of it until after May 25th. The court had found that the removal of the 45 cases to Brooklyn was for the purpose of preventing the appellees from completing their attachment of the goods. Upon examination of the record, it appears that in answer to the question: "I show you a warrant of attachment (Plaintiffs' Exhibit 47). When was that received in the sheriff's office?"—the deputy sheriff said, "That was received May 21st." Plaintiffs' Exhibit 47 was not the Hadden & Co. warrant, but the Rice warrant, of attachment, which was obtained May 16th, and was attempted to be served on May 18th; and, if there was no other or explanatory testimony, the contention of the appellees would be supported. The entire testimony of the deputy sheriff shows that the reference to Exhibit 47 was a clerical error or a mistake; that the warrant for the Hadden attachment was delivered to the sheriff on May 21st; that a copy was on the same day delivered to Thompson, who had the immediate charge of the goods, and who represented that they did not belong to the silk company; that subsequently Hadden & Co. gave to the sheriff a bond. And it appears from the testimony of Thompson that after May 21st, and before May 25th, he knew that the 45 cases were to be removed by the bank, and that he had given instructions to permit such a removal, if desired by the bank's representatives. There was no error in the statement of the facts, or in the inferences from them which were given in the opinion. We find no reason for altering the conclusions of the court, and its previous decision is affirmed.

STEEL et al. v. LORD.

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

No. 114.

PROCEEDINGS IN ERROR — SCOPE OF REVIEW — FAILURE TO WAIVE JURY IN WRITING.

Unless there is a written waiver of trial by jury in an action at law in a circuit court, Rev. St. §§ 649, 700, do not apply; and where findings made by a referee are ordered to stand as the findings of the court, the only question that can be reviewed by an appellate court is the sufficiency of the findings to support the judgment.

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

James F. Kilbreth, for plaintiffs in error.

Before WALLACE and SHIPMAN, Circuit Judges.

PER CURIAM. Frank J. Lord, of the city of New York, brought an action at law in the supreme court of the state of New York against the members of the firm of Steel, Young & Co., of London, England, which was removed to the United States circuit court for the Southern district of New York. The plaintiff subsequently died, and the cause was revived in the name of Louise MacFarland Lord, as his executrix. In pursuance of a stipulation between the parties, it was ordered by the circuit court that the "action be, and the same is hereby, referred to Hamilton Odell, Esq., as referee to hear and determine." The case was heard by the referee, who made a finding of facts, which were made the findings of the court; and judgment was entered for the plaintiffs in accordance with the amounts as found by the referee.

The assignment of errors contains exceptions to the referee's various findings of fact, and to his rulings in regard to the admission of testimony, but contains no assignment that there was error in the judgment upon the facts as found. The rule of the supreme court in Shipman v. Mining Co., 158 U. S. 356, 15 Sup. Ct. 886, is precisely applicable to this case:

"As the court in its judgment ordered his [the referee's] findings to stand as the findings of the court, the only question before this court is whether the facts found by the referee sustain the judgment. As the case was not tried by the circuit court upon a waiver in writing of a trial by jury, the court cannot review exceptions to the admission or exclusion of evidence, or to findings of fact by the referee, or to his refusal to find facts as requested."

The cases of Bond v. Dustin, 112 U. S. 604, 5 Sup. Ct. 296, and Paine v. Railroad Co., 118 U. S. 152, 6 Sup. Ct. 1019, are to the same effect.

The earlier case of Boogher v. Insurance Co., 103 U. S. 90, to which attention is called by the plaintiff in error, contains nothing which is not in harmony with these decisions. The court found that it sufficiently appeared that a written stipulation of the waiver of a jury had been filed, and held that, therefore, the provisions of sections 649 and 700 of the Revised Statutes were applicable, and that, in addition to the question whether the facts found were sufficient to support the judgment, the appellate court could pass upon the rulings of the trial court, in the progress of the trial before it, which were presented by a bill of exceptions, but that exceptions to the sufficiency of the evidence before the referee to support the findings could not be re-examined. The judgment is affirmed.

LANGAN v. PALATINE INS. CO.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. May 2, 1899.)

INSURANCE—ACTION ON POLICY—PLEADING.

The question of the validity of an award of appraisers appointed under the provisions of a fire insurance policy to appraise a loss thereunder cannot be raised, in an action to recover the amount of the loss, by a demurrer to the petition which alleges the regularity of all the proceedings.

This is an action on a policy of insurance against fire. Heard on demurrer to petition.

R. C. Langan, M. A. Walsh, and J. S. Darling, for plaintiff.
George S. Steere and Hayes & Schuyler, for defendant.

SHIRAS, District Judge. From the record in this case it appears that on the 9th day of January, 1898, the defendant company issued to plaintiff a policy of insurance in the sum of $5,000 upon a certain dwelling house situated in the city of Clinton, Iowa; it being provided in the policy that, in case of damage by fire, the insured should, within 60 days after the happening of the fire, furnish to the company certain proofs of loss, and that, "in the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire. The appraisers together shall then estimate and appraise the loss, stating, separately, sound value and damage, and, failing to agree, shall submit their difference to the umpire, and the award in writing of any two shall determine the amount of such loss;" it being also further provided that the loss shall not become payable until 60 days after the required proofs of loss, including the award of appraisers in case one is had, have been received by the company. It is further averred in the petition that on the 23d day of January, 1898, the insured property was destroyed by fire; that thereupon written notice of the fire was given to the defendant company, and on the 6th of March, 1898, proofs of loss were furnished the defendant, and that on the 9th day of March, at the request of the defendant, a written agreement was entered into providing for an appraisement of the loss sustained; that each party selected an appraiser, and these two selected an umpire or third appraiser; that, the two appraisers originally appointed failing to agree, the matters in difference were submitted to the umpire, and on the 30th day of June, 1898, an award in writing, signed by one of the parties originally selected as appraiser and by the umpire, was returned, fixing the total loss to the plaintiff at the sum of $20,095; that in making such appraisement the appraisers in all respects observed the requirement of the agreement for arbitration. To this petition a demurrer is interposed, setting forth a number of grounds upon which it is claimed that the award is void, but the difficulty in thus submitting the case is that the court cannot assume the facts to be otherwise than is averred in the petition, and upon its face a cause of action is stated.