HOME INDEMNITY COMPANY OF NEW YORK *v.* JELKS.

4-3006

Opinion delivered May 8, 1933.

1. INSURANCE—BURGLARY BY FORCE.—Where a policy covered burglary of a safe by force, and exempted burglary by manipulation of the safe's lock, proof by insured that the safe was forcibly broken made a *prima facie* case, and the insurer had the burden to show that the burglary was effected by manipulating the lock without force.
2. EVIDENCE—EFFECT OF EXPERT TESTIMONY.—It is the exclusive province of the jury to determine the value and weight to be given to the testimony of expert witnesses.

Appeal from Craighead Circuit Court, Jonesboro District; *Neil Killough,* Judge; affirmed.

STATEMENT BY THE COURT.

This suit was instituted by W. C. Jelks, appellee, against appellant, Home Indemnity Company of New York, to compensate a burglary which was alleged to have been effected in appellee's place of business in the town

of Jonesboro. This alleged burglary occurred on the night of March 16, 1932. Prior to that time the appellant, Home Indemnity Company of New York, had effected a policy of burglary insurance in favor of appellee, the pertinent clauses of said policy read as follows:

"Loss by burglary of any property from within that portion of any safe or vault to which the insurance under this policy applies, occasioned by any person or persons making felonious entry into such safe or vault by actual force and violence, of which force and violence there shall be visible marks made upon such safe or vault by tools, explosive, electricity, gas or other chemicals, while such safe or vault is duly closed, and locked, by at least one combination or time-lock, and located in the insured's premises as hereinafter defined, or as located elsewhere after removal therefrom by burglars."

Paragraph D (4) provides that the company shall not be liable for loss or damage "effective by opening the door of any vault, safe or chest by the use of a key or by the manipulation of any lock."

On the trial of the case in the circuit court appellee introduced testimony to the following effect:

That he was engaged in the garage business in Jonesboro on March 16 and 17, 1932; that on the night of the 16th he remained in his place of business until nine or ten o'clock, when the building was closed up and the doors locked; that the safe was locked, and the combination effected prior to his leaving the building; that on the morning of the 17th it was discovered that the safe had been entered, the contents taken therefrom, the money stolen and papers scattered on the floor, together with some small coins; that on examination it was determined that the dial on the lock had been broken off with some blunt instrument and the safe had been opened in some manner unknown to the appellee and his witnesses; that there was stolen from the safe $970.39; that the knob on the dial of the safe had dents in it which indicated that it had been struck with a blunt instrument; that there was no indication on the doors or windows of the building that force had been used in entering the building;

that the locks on the doors and windows were intact, as they were the night before when he left the building.

The testimony on behalf of appellant was to the following effect:

A witness by the name of A. E. Johnson, a locksmith, testified that he was called by the chief of police and found the door of the safe open, the dial knocked off, and he further testified that the safe could not have been opened except by working the combination; that, with the dial knocked off, the combination could not be worked. This witness further testified on cross-examination "that I have opened hundreds of safes in the last few years without knowing the combination. It is possible to open a safe without knowing the combination."

Mr. A. E. Linzel, a safe and lock expert for fifteen years, testified in effect that this safe was opened by manipulating the tumblers; that he had examined the dial and lock to this safe carefully; that, if the dial had been knocked off prior to manipulating the combination, it would have been impossible to dial the combination. "When that happens, it is necessary to drill into the lock proper and break the tumblers to pieces; if the dial is broken off, you destroy the effective handle, in working the combination, and the key by which you work it." That when he saw this safe the spindle was in place, and no marks of violence appeared upon it except the screw was broken in two; that, after this dial was broken off, it was impossible to work the combination; that, as an expert, he could not have worked the combination with the dial knocked off.

After the introduction of the above testimony, the appellant moved the court to direct the jury to return a verdict in its favor. The court refused this request and submitted the issues of the case to the jury. The jury returned a verdict in favor of the appellee, from which this appeal is prosecuted.

Buzbee, Pugh & Harrison and *Dudley & Barrett,* for appellant.

Basil Baker, for appellee.

JOHNSON, C. J., (after stating the facts). But one question is presented in this appeal for determination,

namely: Did the trial court err in refusing to direct a verdict for appellant?

We think that, under the terms of the policy of insurance sued on in this case, when appellee produced facts and circumstances in testimony showing, or tending to show, that the safe was forcibly broken and entered, and that loss was sustained by reason thereof, this made a *prima facie* case on behalf of appellee, and the burden then shifted to appellant to show by testimony that the burglary was effected by manipulating the tumblers or lock, which would exempt it from liability.

In brief and oral argument it is insisted on behalf of appellant that the testimony of the two expert witnesses, Johnson and Linzel, is reasonable, consistent and unimpeached, therefore that the trial court should have, as a matter of law, so advised the jury.

Let's see. This court held in *Tatum* v. *Mohr,* 21 Ark. 349, quoting from a headnote of the opinion:

"It is competent for witnesses skilled in the science and practice of medicine to give their opinions to the jury on questions involving the soundness of a slave, in relation to the disease with which he was afflicted, its character, etc., but the jury are the judges of the weight to be attached to their opinions."

Again, this court held in *Arkansas S. W. Ry. Co.* v. *Wingfield,* 94 Ark. 75, 126 S. W. 76:

"It is for the jury to determine what value his opinion is entitled to under the circumstances, and to give it such weight as they think it deserves."

It is evident from previous decisions of this court that it is the exclusive province of the jury to determine the value and weight to be given the testimony of expert witnesses, and the jury is authorized to believe or disbelieve the whole or any part of such expert witnesses' testimony.

The jury, in the exercise of their exclusive province in this case, has determined to disregard the testimony of the expert witnesses, therefore we cannot, as a matter of law, say that they should not have done so. To do so would overrule the cases hereinabove cited, and we are unwilling to do this.

No error appearing, the judgment of the trial court is affirmed.