

GAHAGAN v. UNION MUTUAL INSURANCE COMPANY.

Upon an application by the plaintiff for insurance upon his dwelling-house, made through a person who was in the habit of taking applications and forwarding them to the company, a policy of insurance was made and signed, and, with the application and premium note, neither of which were signed by the plaintiff, put into the hands of one R, who delivered them all to the plaintiff, who kept them in his possession, without signing the application or note, until after the loss by fire:—*Held*, that, if the contract took effect at all, the application must be regarded as part of it; and, as it represented the land to be unincumbered, when, in fact, there was a mortgage upon it, the policy, in accordance with the provisions of the charter, was void.

THE parties agreed to the following facts :

This is an action of assumpsit, to recover for loss and damage by fire. On the 12th day of May, 1858, a policy of insurance was made at the office of said company of \$350 on the plaintiff's dwelling-house, and \$50 on household furniture therein.

Before the policy was made, an application and blank note were furnished to the company by James B. Marston; and, after the policy was made, the policy, application, and note, were delivered by the secretary of the company to Marston; and the secretary will swear that he has no doubt that the instructions to Marston were that the policy was to be delivered to the plaintiff, upon the signing of the application and the note, and the payment of the premium, although he has no recollection of the transaction, except that such is his opinion from the papers. Marston delivered the policy, application, and note, to one Rolfe, and Rolfe delivered them all to the plaintiff, within a few weeks after the policy was made. Neither the application or note were ever signed or redelivered to the company, nor was the premium ever paid. The property was destroyed by fire, December 9, 1859.

At the time the application and policy were made, a mortgage existed upon the dwelling-house, from the plaintiff to one John N. Speed, for \$125, the existence of which was not known to the company until after the fire, being informed thereof by the plaintiff in his notice of the loss.

After the fire and claim of loss by the plaintiff, when an assessment was made by the company upon notes of the class in which the plaintiff's policy belonged, the plaintiff was notified by mail of an assessment of \$2.40 on this policy, which has never been paid.

The plaintiff, in his statement of loss to the company after the fire, claimed for furniture \$25, upon which the directors passed the following vote: "*Voted*, To allow A. Gahagan, as a gratuity for loss on property described in application No. 6348, village class, the sum of \$25, free from assessment on amount of premium note, which premium note should have been given to the company for \$24, as per said application."

Marston was in the habit of taking applications for insurance in the company, and forwarding them to the company, upon which the company were in the habit of issuing policies; but he had no appointment as agent of the company.

Copies of the policy, application, and note, and the charter and

by-laws of the company, were a part of the case. It was agreed that, if the court should be of opinion that the plaintiff could recover for the loss of the dwelling-house, judgment should be rendered for the sum of \$175 upon the house, and \$25 upon the personal property, deducting any orders that may have been accepted by the company; or the plaintiff might recover two thirds of the value of the property, as found by a jury; otherwise, judgment should be rendered for the defendants for costs.

A. S. Marshall, for the plaintiff.

Fowler & Chandler, with *George, Foster & Sanborn*, for the defendants.

BELLOWS, J. By the charter of the defendant corporation, all buildings, and the land upon which they stand, and the property insured therein, shall be held as security for any deposit note which is held for such insurance; and the policy itself shall create a lien upon the same. And it is provided that, if the assured have an estate less than a fee-simple, unincumbered, in the property insured, "or if the property or premises are incumbered, policies shall be void, unless the true title of the assured and the incumbrances on the same be expressed therein." Sections 7 and 11 of the act of incorporation.

Under these circumstances, the existence of an incumbrance is a fact material, as a matter of law, to be disclosed; and, if not set forth in the policy, it will be void, unless it be shown that the incumbrance was known to the insurer, and not fraudulently concealed.

The case before us, provided the contract was completed, is brought clearly within the principle of *Marshall v. Insurance Co.*, 27 N. H. 157, and that principle is confirmed by the case of *Patten v. Insurance Co.*, 38 N. H. 338, and other cases cited by the defendant's counsel.

The question then is, was any contract of insurance made or perfected? and if so, what was it? The case finds that the application, premium note, and policy, the latter signed, and the others not signed, were placed in the hands of the plaintiff a few weeks after their date, and were retained by him, without signing the application or note, or paying the premium, until after the loss of the property by fire, December 9, 1859. Whether as matter of law there could be a delivery of the policy so as to take effect as such, until the execution of the application and premium note, it is not, with the views we entertain, necessary to inquire; because we are of the opinion that the application and policy, with the charter and by-laws, are but parts of an entire contract, and that the plaintiff could not receive and hold the policy as binding upon the defendant, without, at the same time, recognizing and giving effect to the application and all its stipulations, as binding upon him. The policy expressly refers to the application for a description of the property insured, and as forming a part of the policy; and, in accordance with repeated decisions in this State, the application must be regarded the same as if incorporated into the policy itself.

This is held in *Patten v. Insurance Co.*, and *Marshall v. Insurance Co.*, before cited.

It is true, it might be open to the plaintiff to show that, in this case, the application was not made a part of the policy; but to do so against the written stipulation in the policy, would probably require something more than parol testimony, and nothing of any kind in that direction is shown. We hold, then, that, if any contract of insurance was made, the application, upon the facts before us, must be regarded as part, and binding upon the plaintiff; and, therefore, as the incumbrance upon the property was not made known, the policy must be held void. If it were material to inquire whether the policy was, in fact, delivered without requiring the execution and delivery of the application and note, and it were competent in law to show it, there is nothing stated in the case from which the court could properly make an inference as to the fact of such delivery, but it would be a matter for the jury.

As such inquiry is not deemed necessary, and as the plaintiff is not entitled to recover for the loss of the dwelling-house, there must be, in accordance with the agreement of the parties,

Judgment for the defendant.

PITTSFIELD BANK v. CLOUGH.

43 178
69 70
69 398

A trustee in foreign attachment, who acquired land from the defendant in fraud of the defendant's creditors, and afterward sold the land, is chargeable only for the profits of the transaction.

FOREIGN ATTACHMENT. The principal defendants, Thomas Clough and others, made no defense, and the trial was to determine the liability of the trustees, David M. Clough and others.

The plaintiffs claimed that the trustees were chargeable, among other things, for the proceeds of the sales of certain real estate made by them, formerly the property of the defendant, Thomas Clough, and which had come into their hands by virtue of certain mortgages and levies, alleged to have been fraudulent and void as to the creditors of the defendant, because made to cover up the property, in order to hinder, delay, and defraud the creditors.

On trial, it appeared that the trustees acquired their title to a portion of the real estate for whose proceeds they were sought to be made chargeable, by the foreclosure of certain mortgages, taken by them from the defendant, by taking and retaining possession thereof for one year, and giving notice of such possession taken in a newspaper, agreeably to the provisions of the statute; and to another portion by the levy of sundry executions against the defendant thereon, which executions had issued in suits originally commenced by creditors of the defendant, whose interest therein said trustees had purchased before judgment. The plaintiffs claimed that these mortgages were taken by the trustees, and the interest of the creditors in the suits wherein said executions issued, purchased,