

Statement of the Case.

HOSFORD v. GERMANIA FIRE INSURANCE COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

No. 263. Argued April 26, 27, 1888. — Decided May 14, 1888.

A provision in a policy of fire insurance, that if the interest of the assured in the property is "any other than the entire, unconditional and sole ownership for the use and benefit of the assured," or is "incumbered by any lien, whether by deed of trust, mortgage or otherwise," it must be so represented in the policy, does not, if it is stated that the property is incumbered, require a statement of the nature or amount of the incumbrances.

An application for fire insurance, expressly made a part of the policy and a warranty by the assured, contained these questions and answers: "Is there any incumbrance on the property? Yes. If mortgaged, state the amount. \$3000." *Held*, that an omission to state that the property was incumbered otherwise than by mortgage was no breach of the warranty.

A warranty, in a contract of fire insurance, that "smoking is not allowed on the premises," is not, if smoking is then forbidden on the premises, broken by the assured or others afterwards smoking there.

THIS was an action by Hosford and Gagnon on a policy of insurance, dated May 14, 1883, by which the Germania Fire Insurance Company and the Hanover Fire Insurance Company, severally and not jointly, and as if by separate policies, insured the plaintiffs, against loss by fire for a year from that date, each one half of the sum of \$8000, payable in sixty days after notice and proof of loss, upon their flour-mill, elevator and machinery in the town of Rulo and State of Nebraska; "special reference being had to assured application No. 20,157, which is hereby made a part of this policy and a warranty on the part of the assured;" "loss, if any, payable to Israel May, mortgagee, as his interest may appear." The policy contained these provisions:

"The application, survey, plan or description of the property herein insured shall be considered a part of the contract and a warranty by the assured; and any false representation

Statement of the Case

by the assured of the condition, situation or occupancy of the property, or any omission to make known every fact material to the risk, or any overvaluation, or any misrepresentation whatever, either in a written application or otherwise," shall render the policy void.

"If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured, or be incumbered by any lien, whether by deed of trust, mortgage or otherwise, or if the building insured stands on leased ground, it must be so represented to the companies and so expressed in the written part of this policy; otherwise, this policy shall be void."

The application was of the same date as the policy, and was signed by the assured, and contained a great number of printed questions and written answers, and so much of it as is material to be stated was as follows:

"The applicant will answer particularly the following questions, and sign the same, as descriptive of the premises and forming a part of the contract of insurance and a warranty on his part:"

"What material is used for lubricating or oiling the bearings and machinery? Tallow, lard and machine oils.

"Will you agree to use only lard and tallow, or sperm and lard oils for lubricating? Lard and tallow, or lard and machine oils.

"Is the machinery regularly oiled, and by whom? Yes, by regular attendant.

"Will you agree to keep all the bearings and machinery properly supplied with oil? Yes."

"Is smoking or drinking of spirituous liquors allowed on the premises? No."

"Is there any incumbrance on the property? Yes.

"If mortgaged, state the amount. \$3000."

"The subscriber hereby covenants and agrees to and with the said companies that the same is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risks of the property to be insured, and said answers are considered the basis on which insurance

Statement of the Case.

is to be effected, and the same is understood as incorporated in and forming a part and parcel of the policy; and further covenants and agrees that if the situation or circumstances affecting the risk shall be so altered or changed during the time of any policy of insurance which may be fixed upon the application, or any renewal of said policy, as to render the risk more hazardous, [he] will notify the officers of said companies, or their general agent, forthwith of such alteration."

The case was tried by a jury, who returned a special verdict, finding the value of the property insured and its loss by fire on August 1, 1883, and so much of the rest of which as is material to be stated was as follows:

"The plaintiffs forbade smoking to go on in the mill, but smoking was done on the grinding floor." "One of them himself smoked upon and in the mill."

"At the time of the application, there was due Israel May on his notes and mortgage on said premises the sum of \$3079.45." "There were taxes of the county and State on said premises for several years prior to the issue of the policy, which were delinquent and unpaid, and still remain unpaid, amounting to the sum of \$329.40 on May 14, 1883."

On July 2, 1885, the Circuit Court gave judgment for the defendants. The plaintiffs brought the case to this court by writ of error, with a certificate of division of opinion between the Circuit Judge and the District Judge upon the following questions:

"1st. Whether the plaintiffs or the defendants, insurance companies, are entitled in law to recover judgment on said verdict and special findings of the jury returned in said cause.

"2d. Whether the fact that delinquent taxes on the mill, to the amount of \$329.40, were due and unpaid at the time the application for insurance on the property destroyed was made, and that fact was not disclosed by the applicants to the insurers, will defeat the plaintiffs' right to recover.

"3d. Whether the fact that smoking was done in the mill, the proprietor of the mill being one that smoked, notwithstanding the plaintiffs had stated in their application for insurance that smoking was forbid therein, will defeat their

Opinion of the Court.

right to recover, the fire that destroyed the property not having originated from that cause."

Mr. T. M. Marquett and *Mr. Isham Reavis* for plaintiffs in error.

Mr. Samuel Shellabarger, (with whom was *Mr. J. M. Wilson* on the brief,) for defendants in error.

MR. JUSTICE GRAY, after stating the case as above reported, delivered the opinion of the court.

If this policy is valid, each of the defendants was severally liable for no more than the sum of \$4000, and interest thereon to the date of the judgment in the Circuit Court. The whole amount recoverable against either defendant in that court being less than \$5000, this court has no jurisdiction of the case, except by reason of the certificate of division of opinion. *Ex parte Phoenix Ins. Co.*, 117 U. S. 367; *Dow v. Johnson*, 100 U. S. 158; *Williamsport Bank v. Knapp*, 119 U. S. 357. The first question certified is too general to be answered, because it undertakes to refer the whole case to the decision of this court. *Jewell v. Knight*, 123 U. S. 426. Nothing is open for consideration, therefore, but the second and third questions upon which the opinions of the judges of the Circuit Court were opposed.

The whole scope of that clause of the policy, which requires the interest of the assured, if "other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured," or if "incumbered by any lien, whether by deed of trust, mortgage or otherwise," to be so represented by the assured and so expressed in the policy, is to ascertain whether his interest comes within either of these two descriptions, and not to call for information as to the nature or amount of any incumbrances. It is therefore fully satisfied by the statements in the application that there is an incumbrance on the property, and what the amount of mortgage is, and by the expression in the policy making the insurance pay-

Opinion of the Court.

able to a mortgagee. *Williams v. Roger Williams Ins. Co.*, 107 Mass. 377.

By the terms of this policy, and of the application made part thereof, the answers to the questions in the application are doubtless warranties, to be strictly complied with. But this court is unanimously of opinion that, so far as regards either of the matters presented for its decision in the present case, these answers are direct, full and true.

The only questions put as to incumbrances are, first, the general one, "Is there any incumbrance on the property?" which is truly answered, "Yes;" and, second, the particular one, "If mortgaged, state the amount," in answer to which the assured states the principal sum due on the mortgage. The effect of omitting to include the additional sum due for less than half a year's interest is not presented by the certificate of division. The insurers having put no question as to the nature or the amount of incumbrances, otherwise than by mortgage, cannot object that no information was given upon that subject. *Phoenix Ins. Co. v. Raddin*, 120 U. S. 183. There was, therefore, no breach of warranty in not disclosing the lien for unpaid taxes, independently of the question whether such a lien was an incumbrance, within the meaning of this contract; and this case does not require a decision of that question.

As to smoking, the only question put in the application, and answered in the negative, is whether smoking is "allowed on the premises"—which looks only to the rule established upon the subject at the time of the application, and not to the question whether that rule may be kept or broken in the future. This appears by the language of the question, as well as by the circumstance that it is not, as other interrogatories as to existing precautions against fire are, followed up by compelling the assured to agree that they will continue to observe the same precautions. The jury having found that the assured forbade smoking in the mill, the mere fact that other persons, or even one of the assured, did afterwards smoke there, was not sufficient to avoid the policy.

The two cases, cited by the defendants from the Illinois

Statement of the Case.

Reports, contain no adjudication to the contrary. The point decided in each was that smoking by workmen in the mill did not avoid the policy, and the remark of the judge delivering the opinion, that in such a case the assured undertakes that he will not himself do the act, was *obiter dictum*. *Ins. Co. of North America v. McDowell*, 50 Illinois, 120, 131; *Aurora Ins. Co. v. Eddy*, 55 Illinois, 213, 219.

Judgment reversed, and case remanded to the Circuit Court, with directions to render judgment for the plaintiffs upon the special verdict.

HOSFORD v. HARTFORD FIRE INSURANCE COMPANY.

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An application for fire insurance, warranted to be "a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value, ownership, title, incumbrances of all kinds, insurance and hazard of the property to be insured," contained these questions: "Is there a mortgage, deed of trust, lien, or incumbrance of any kind, on property? Amount, and in whose favor?" *Held*, that the questions related only to incumbrances created by the act or with the consent of the applicant, and that an omission to disclose an existing lien created by statute for unpaid taxes was no breach of the warranty.

THIS case was substantially like that of *Hosford v. Germania Ins. Co.*, *ante*, except that no question arose as to smoking on the premises, that the policy itself contained no provision on the subject of incumbrances, and that so much of the application as related to that subject was in this form:

"13. Incumbrance. — Is there a mortgage, trust deed, lien, or incumbrance of any kind, on property? Yes. Amount, and in whose favor? \$3000; I. May. What is the entire value of property incumbered? \$21,000."