REPORTS

OF

CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

VOLUME V.

RICHMOND:
PUBLISHED BY ROBERT I. SMITH.
Samuel Shepherd & Co. Printers.
1833.

MUTUAL ASSURANCE COMPANY *v.* MAHON. 1805. *November.*

Leasehold tenements are not insurable by the Mutual Assurance company.

Mahon filed a bill in the superior court of chancery stating, That he leased an unimproved lot of land in Norfolk, of *Marsden*, at £ 30 per annum, for ten years; and was to be at liberty to remove the houses he might erect on it. That this kind of lease is usual in Norfolk; and that the plaintiff had built a dwelling house and kitchen on the premises, which he insured in the defendants' office; but the same were afterwards accidentally burnt; that the defendants refused to pay the sum insured; and therefore the bill prayed a decree for payment, and general relief.

The answer admitted that the houses were insured; but deny notice of the lease; and insist that no other than fee simple tenements are insurable in their office.

The lease was proved by two witnesses; and recorded in due time.

The court of chancery decreed payment of the sum insured, with interest; and the defendants appealed to the court of appeals.

Wickham, for the appellants. It is uniformly true that a concealment of facts, or suppression of circumstances, avoids the contract; and it makes no difference whether the concealment, or suppression, arose from inadvertence or design. 1 *Marsh. Ins.* 347. A mere wager insurance would not have been good at common law, 2 *Marsh. Ins.* 684: and it is clear that the insured must have the unqualified property in goods. But this is plainly a wager policy; for the lease may be worth nothing, and consequently the right to remove the house will make no difference, especially as the expense attending the removal, would often exceed the value of the house. 2 *Marsh. Ins.* 706. It is necessary, for the safety of the company, that the insured should be the owner; for, otherwise, it would be for his in-

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terest that the house should be burnt, and the insurers would consequently be more liable to losses from various causes.

Call and *Hay, contra.* The insurance, in this case, is not repugnant to the principles of the institution; for the act of incorporation says, "*that the citizens may insure their buildings, &c.,*" without distinguishing between freehold and leasehold estates; and a contrary construction would defeat the object of the law, which was that *all* proprietors of houses should partake of the benefits of it. The company could receive members upon what terms they pleased; and one of their regulations was that leasehold interests might be insured. The tenant was the real owner, as he had every right in the lease which an owner can have; and it was the building only, and not the land which was insured: so that the society had the security which they asked, and therefore ought to be bound by their contract; for the only object of quantity in the estate, would be to afford security; and, if they had such as was satisfactory, there could be no necessity for a freehold. Besides, the valuation might have been less on account of the lease, and consequently the risk diminished. It was not a wagering policy; because the tenant, as before observed, had a real interest, and the materials, after the loss, belonged to the company. There was no misrepresentation; for the lease was recorded, and the society did not profess to insure none but freehold houses.

Randolph, in reply. The insured had but a leasehold interest, and the policy is for the full value in fee. It is not proved that the society were in the habit of granting insurances on leasehold estates; and the materials would be no indemnity for the risk. Not only the houses, but the land on which they stand too, were to be pledged; and therefore without a fee in the owner, the security was defeated. The appellee did not disclose the interest, and the record was not notice: but, without notice, the policy was void, as both parties ought to be acquainted with the situation of things at

the time of the contract. *Burns. Ins.* 70. The appellee was only entitled to a return of premium and quotas; but at most to a *pro rata* compensation.

LYONS, President, delivered the resolution of the court, as follows:

"The court is of opinion, that, in bargains and contracts of every kind, a full, fair and correct representation of all material facts, matters and circumstances respecting the article or thing about which parties are bargaining, and all the qualities of, and concerning it, ought to be clearly stated and fully understood; good conscience dictating, and good faith requiring, that no material truth should be suppressed, or falsehood suggested: which principles are the governing rules of decision in courts of equity, where contracts founded on fraud or accident, or induced by misrepresentation or concealment, even by mistake, without the design of either party, are declared to be null and rendered void, as contrary to good faith and true conscience.

"That the appellee having only a temporary estate and interest for a term of years in the land whereon the house insured by him stood, as stated in the proceedings of this cause, and not having disclosed his true title and real interest in the said land, fully and fairly in the declaration he made of it to the appellants at the time they insured the said house, as he ought to have done, his case comes within the above rule respecting concealment or misrepresentation; and whether done by design, or mistake, renders his contract with the insurers null and void; especially, as, by the constitution, rules and regulations of the society, formed by the insurers in this case, the assurance was mutual, and the insured bound to pay a share, according to the sum insured, of all losses sustained by any of the insurers and partners in the insurance company; and the property of each person so insured being bound for such payment, ought to be as permanent as the property of the others to answer such losses; or, if not so permanent, should, at least, be

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known to the company before insurance thereof made; and that, therefore, the appellee, under all the circumstances of this case, is not entitled to recover the money claimed by him in his bill filed in this cause, for the value of the house insured by him, which was burnt down: but, as no fraud appears to have been contemplated by him, and the insurance might have been made and done through the mistake or misapprehension of both parties, this court is of opinion that all money paid or advanced by the appellee to the appellants, or their agents for premiums and quotas on account of his insuring the said house, should be repaid to him with interest, and that the parties ought to bear their own costs in the said court of chancery: Therefore it is decreed and ordered that the decree aforesaid be reversed and annulled, and that the appellee pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here.

"And it is ordered that this cause be remanded to the said court of chancery, for an account to be taken and a decree to be entered according to the opinion and principles of this decree."

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TAYLOR *& al. v.* STEWART'S *ex'ors.*

A judgment against the executor is necessary, before a suit can be brought upon his administration bond.

What is a sufficient assignment of breaches in such a suit?

This is a *supersedeas* to a judgment of the district court of Fredericksburg, reversing a judgment obtained in the county court of Caroline, by the appellants against the testator of the appellees.

The action in the county court was brought in the name of *James Taylor & al.*, surviving justices of Caroline,