*Mutual Assurance Society *v.* Watts's Executor.

Mutual insurance company.

Under the 6th and 8th sections of the act of assembly of Virginia, of the 22d of December 1794, property pledged to the Mutual Assurance Society, &c., continues liable for assessments, on account of the losses insured against, in the hands of a *bonâ fide* purchaser, without notice.

A mere change of sovereignty produces no change in the state of rights existing in the soil; and the cession of the district of Columbia to the national government, did not affect the lien created by the above act, on real property situate in the town of Alexandria, though the personal character or liability of a member of the society could not be thereby forced on a purchaser of such property.

Appeal from the Circuit Court in the district of Columbia for Alexandria county. The cause was argued by *Swann*, for the appellants, and by *Taylor* and *Lee*, for the respondents.

March 16th, 1816. Johnson, J., delivered the opinion of the court, as follows:—*This is a bill in chancery, filed by the complainants, to charge certain premises, in the possession of the defendant, situate in [*280 the town of Alexandria, with the payment of a sum of money, assessed in pursuance of the laws establishing the Mutual Assurance Society, for *quotas* becoming due, after his testator acquired possession. The executor has, in fact, sold the premises, under a power given him by the testator, but the money remains in his hands; and it is conceded, that the sole object now contended for is, to charge the money arising from the sale of the land in question, with the assessment to which, it is contended, that the land was liable. The insurance was made in 1799, and the property sold to the defendant's testator in 1807, long after the town of Alexandria ceased to be subject to the laws of Virginia. It is admitted, that the sale was made without notice of this incumbrance (if it was one), and the *quota* demanded was assessed on the premises, for a loss which happened subsequent to the transfer.

The points made in the case arise out of the construction of the 6th and 8th sections of the act of Virginia, passed the 22d of December 1794. The 6th section is in these words: "If the funds should not be sufficient, a repartition among the whole of the persons insured shall be made, and each shall pay, on demand of the cashier, his, her or their share, according to the

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of Holland (as far north as the river Ems) and France, together with the colonies of both, and all ports of Italy, included between Orbitello and Pesaro.

On the 10th of August 1809, the non-intercourse with Great Britain again took place, in consequence of Mr. Erskine's arrangement not being ratified.

On the 1st of May 1810, the trade with both Great Britain and France was opened, under a law of congress, that whenever either power should rescind its orders or decrees, the president should issue a proclamation to that effect; and in case the other party should not, within three months, equally withdraw its orders or decrees, that the non-importation act should go into effect, with respect to that power. On the 2d of November 1810, the president issued his proclamation, declaring the Berlin and Milan decrees to be so far withdrawn, as no longer to affect the neutral rights of America; and the orders in council not being rescinded.

On the 2d of February 1811, the importation of British goods, and the admission of British ships into America, were prohibited. On the 4th of April 1812, an embargo was laid in the United States, and on the 18th of June following, war was declared against Great Britain.

sum insured, and rate of hazard at which the building stands, agreeably to the rate of premium, for which purpose it is hereby declared, that the subscribers, as soon as they shall insure their property in the Assurance Society aforesaid, do mutually, for themselves, *their heirs, executors, administrators and assigns, engage their property insured, as security, and subject the same to be sold, if necessary, for the payment of such *quotas*." And the 8th section is in these words: "To the end that purchasers or mortgagees of any property insured by virtue of this act, may not become losers thereby, the subscriber selling, mortgaging or otherwise transferring such property, shall, at the time, apprise the purchaser or mortgagee of such assurance; and indorse to him or them the policy thereof. And in every case of such change, the purchaser or mortgagee shall be considered as a subscriber, in the room of the original, and the property so sold, mortgaged or otherwise transferred, shall still remain liable for the payment of the *quotas*, in the same manner as if the right thereof had remained in the original owner."

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In the argument, two points were made, 1st, That property pledged to the society remained liable for the *quotas* to a purchaser without notice. 2d. That the purchaser, by the purchase of such property, although without notice, became, by virtue of the 8th section, a member of the society, and liable, in all respects, as such.

The second of these questions is now withdrawn from the consideration of this court, by an agreement entered on record. And it must be admitted, that whatever may be the strict construction of the 8th section, and its operation in the state of Virginia, so far as it intended to force on the purchaser a personal character or liability, it could have no operation in the town of Alexandria, at the date of this transfer. *The laws of Virginia had then ceased to be the laws of Alexandria, and it could only be under an actually existing law, operating at the time of the transfer, that the character of membership in the Virginia company would be forced upon the purchaser. This is not one of those cases in which tenure attaches to an individual a particular characteristic or obligation; such cases arise exclusively between the occupant of the soil, and the sovereignty which presides immediately over the territory. The transfer, therefore, of the district of Alexandria to the national government, put an end to the operation of the 8th section, so far as it operated, by mere force of law, independent of his own consent, to fasten on the purchaser the characteristics of a member. But it is otherwise with regard to the soil. The idea is now exploded, that a mere change of sovereignty produced any change in the state of rights existing in the soil. In this respect, everything remains in the actual state, whether the interest was acquired by law, under a grant, or by individual contract. (See *Korn* v. *Mutual Assurance Society*, 6 Cr. 199.)

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We consider the question, then, as reduced to this: Does property pledged to the society, continue liable for assessments, in the hands of a *bonâ fide* purchaser, without notice, notwithstanding that he does not become a member by the transfer?

Here, we give no opinion on the extent or meaning of the words "property insured," how far they will operate to charge the lands on which buildings stand. The question was not made in the argument, and is *probably of no consequence in this or any other case. We only notice it, in order that such a construction may not be supposed

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admitted, as is too often concluded, because a court passes over a question *sub silentio.*

Whatever be the property thus pledged, it is very clear, that the words of the 6th section are abundantly sufficient, to create in it a common-law lien, not only in the hands of the original subscriber, but by express words, in those of his assignee. If the case rested here, there would be no doubt or difficulty; but every law, and every contract, must be construed with a reference to the subject of that law or contract, and which it is designed to answer. In this view, we readily concede, that the duration of the lien could not extend beyond the duration of the liability of the subscriber to pay the premium; nor could the liability of the subscriber extend beyond the liability of the company to indemnify him. On the other hand, it would seem, that as long as the company could exact of the subscriber the premium, they ought to be held liable to indemnify him. It will, then, be conceded, that the liability of the subscriber, and of the company, are mutual, correlative and co-extensive, and it remains to be examined, how this concession affects the case.

It is very clear, that there are but three ways by which a subscriber can cease to be a member: 1st. By the consumption of the buildings insured, which results from the nature of the contract. 2d. By complying with the stipulations of the 9th article of the rules and regulations of the society. *3d. By substituting a vendee in his place, in conformity with the 8th section of the act of the 22d December 1794. If, then, a subscriber [*284 has not become discharged in one of these three ways, what is to prevent the society from pursuing their summary remedy against him? They are not bound to search for his vendee, or to raise the money by a sale of the property pledged; much less are they bound to prosecute their remedy against a purchaser whose name is unknown to them, or who may be absent from the state, or from the United States, or insolvent, or protected, at the time, by some legal privilege. Their contract is with the original subscriber; their rules point out the mode in which he is to extricate himself from this liability, and if he has not pursued it, what defence is left him against a suit instituted by the society? The court cannot imagine one, that could avail him. He cannot urge, that he has parted with the property. The rules point out to him the conduct that he is to pursue in that event. He may give notice to the vendee of the insurance, and tender an assignment. If the vendee refuse to receive it, he is bound to remain but six weeks longer under the obligation to pay his *quotas* and indemnify the vendee, at the end of which time, he will be entitled to a discharge, upon giving due notice, and complying with the other requisitions of the 9th section. Nor can he urge, that he has no longer any interest in the thing insured; this, if any plea at all, is none in his lips. It belongs to the insurer, to avail himself of it, if it belongs to any one. But it is a plea not true in fact; for he continues *to [*285 indemnify his vendee against the *quotas* that may be assessed, which, by possibility may reach to the value of the whole property sold or insured; and, if correct in principle or fact, still, this plea could not avail him, since it is in consequence of his own folly or *laches*, that he continues liable to pay the premium of insurance for another's property. And should it be urged, that this would be converting an actual insurance into a wager policy, two answers may be given to it, either of which is sufficient; that there is noth-

ing illegal in a wager policy, in itself, and if there were, it is no objection in this case, when it results from the constitution and laws of the society.

But it may be contended, that the insurer is discharged, and therefore, the liability for the *quotas* ceases. It is unquestionably true, as a general principle, that where an insurer runs no risk, equity does not consider him entitled to a premium; and although there exist some reasons in policy and constitution of this society to apply it, in its fullest extent, to this case, yet, to give the argument its utmost weight, we are disposed to concede it. But what has occurred in this case, to discharge the underwriters from their contract? The subscriber was clearly not discharged from his liability to them, and this single consideration furnishes a strong reason for holding them still bound under their contract. What has the subscriber done, inconsistent with that contract? The only act he can be charged with, is alienating, without indorsing the policy. But alienation *alone is perfectly consistent with *286] the contract, for the policy issues to him and his assigns; and so far from interposing any obstruction to alienation, provision is made for that very case, and unlimited discretion vested in the subscriber, to indorse his policy to whom he pleases. Nor is alienation, without indorsing the policy, considered in any more offensive light; inasmuch as the 8th section, which enforces the assignment, declares expressly, that it is for the benefit of purchasers and mortgagees, "to the intent that they may not become losers thereby." It is not pretended, that it is for the society's own security; nor do they ever require notice to be given them, in case of such transfer of the policy. As to them, therefore, it is an innocent act, and we see no ground on which the society can be discharged, either to the vendor or vendee—they certainly remain liable, and although it may be a question to which of them equity would decree the money, yet, to one or the other, it certainly would be adjudged; but it is not material to this argument which, as it is a question between the vendor and vendee.

If, then, the case presents no legal ground for discharging either insurer or assured from the contract, and the lien created by the 6th section be commensurate with the liability of the assured, it will follow, that the plaintiffs, in this case, ought to have a decree in their favor.

But we will examine, at a closer view, the liability of the property in the hands of the vendee. That he is not liable to the summary remedy, is evi- *287] dent, from a variety of considerations. He must, then, be *brought into chancery, to have his property subjected to the consequences of the lien, whenever a loss happens and a *quota* is assessed. In that case, his defence will always be just what it is in this—that he purchased without notice. But this was never held to be a defence to a bill to foreclose a mortgage, which is precisely a similar case to this. Nor is it any better defence, to urge that he could derive no benefit under the policy, in case of a loss; for this is precisely the same defence, a little varied, as will be seen, by supposing that the vendee of a mortgagor should plead, to a bill of foreclosure, that the money borrowed did not come to his use. But his case is not as good as that of the vendee of the mortgagor in the case supposed; for the 8th section makes provision for his relief. That section says, "to the end that purchasers or mortgagees of any property insured, may not become losers thereby," the vendor shall give them notice, and indorse the policy over. In what manner shall the purchasers or mortgagees become

losers, unless the lien is to continue on the property in their hands? If the vendor be guilty of the folly of paying the *quotas*, and the vendee never receives notice of the lien, through a demand from the society, there is no damage sustained. If he should be assailed with such a demand, he has a right to require of the vendee an assignment of the policy; and as there existed an original duty to make such an assignment, it may well be held to operate, *nunc pro tunc*, and carry with it all the benefits of an original assignment.

*But it is contended, that the 8th section explains and limits the 6th section, in such a manner as to restrict the duration of the lien, in the hands of the vendee, to those cases only in which the transfer of the policy also takes place. This consequence cannot be logically maintained. The argument is, that the words "such change," mean only a change of the property, attended with an assignment of the policy, and that if the legislature had supposed that the property sold would, in the hands of the vendee, remain subject to the lien, they would not expressly have subjected it in such a case. But this section will, with philological correctness, admit of a different construction, and a construction more consistent with legal principles, inasmuch as it will not admit of an implication inconsistent with the preceding section, and even with other parts of the same section. Nor, if the construction on which this argument is founded were unavoidable, would the conclusion follow which the argument asserts. The question is, what is the meaning of the words "in every change," in the section under consideration? The solution is only to be found, by referring to the preceding and only other clause of the same section; and there we find, that a general provision is inevitably to be made for every possible change of sale or purchase. The operation of the clause will, then, be only to confirm and support the general words of the sixth section, and if it left any doubt with regard to the duration of the lien, in the hands of the vendee, to remove those doubts by express provision. This construction is also the most consistent with the recital *in the first clause of the same section, which, as has been before observed, with another view, is founded altogether on the idea, that property sold remained pledged to the society, in the hands of the vendee, whether with or without notice; as, in that case alone, could vendees or mortgagees need the protection held out to them in that clause. [*288 [*289

But if a different construction could legally be given to that section, so as to restrict the words "every such case," to mean those cases only which were attended with an assignment of the policy, it would not follow, that the lien ceased its operation in all others. To apply to this case the maxim, *expressio unius est exclusio alterius*, would be a glaring sophism. For, the only principle on which such a conclusion could be founded would be, that the repetition of a legal provision, included, with many others, in another law, produced a repeal of all others, by necessary implication. Such an implication may be resorted to, in order to determine the intention of the legislature, in a case of doubtful import, but cannot operate to destroy the effect of clear and unequivocal expressions. An obvious and unanswerable objection to giving this effect to this clause, is, that it puts it in the power of the subscriber to exonerate the property from the lien, by the single act of sale, not even sustaining it for the term of six weeks after the notice given of his intention to withdraw; an effect, glaringly inconsistent, no less

with the express words, than with the general view of the law on the subject. For there is nothing in the act which obliges the vendee to accept an assignment. *A tender to him, therefore, cannot subject him to any onerous consequences. He does no more than what he may lawfully do. If, then, the lien ceases, unless he accepts the assignment, and it is legally at his option to accept or refuse, the subscriber, in having the right to sell to whom he pleases, has also the duration of the lien submitted to his will.

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Some difficulty has also existed in the minds of some of the court, on the contingent nature of this lien, whether the lien was complete to all purposes, at any period before the assessment of a *quota*. But on this subject, the majority are of opinion, that, as to legal incumbrancy, or duration of a lien, it makes no difference, whether its object is to secure an existing debt, or a contingent indemnity. In the case of *Shirras* v. *Caig*, 7 Cr. 34, this court sustained a mortgage, given to secure an indorser against notes which he might indorse, where he had entered into no stipulation to indorse for the mortgagor. And in the case of bonds given for the discharge of duties, offices or annuities, it never was maintained as an objection, that the object of the lien was future, contingent or uncertain. In this case, the mutual stipulation to indemnify each other against losses, operates as a purchase of the lien, and places the parties on strong equitable grounds as to each other.

Some cases were cited in the argument, from the reports of decisions which have been made in the courts of Virginia. This court uniformly acts under the influence of a desire to conform its decisions to those of the state courts on their local laws; and *would not hesitate to pay great respect to those decisions, if they had appeared to reach the question now under consideration. But they are pursuaded, that those cases do not come up to the present. In the case of *Greenhow* v. *Barton* (1 Munf. 598), it is true, that the decision of the district court, which was finally confirmed, was in favor of the purchaser, without notice. But it was solely on the question, whether he was liable to the summary remedy, or, in other words, liable generally, as a member. And the *Case of Anna Byrd*, reported in the cases of the general court (1 Virg. Cas. 170), was likewise the case of a motion for a summary judgment. In the latter case, the court went much further in charging the vendee, than this court is called upon to proceed in the present case. But in neither of those cases, was a bill filed to charge the vendee, as in the present; nor was the question brought up in either, detached from that of his general liability as a member.

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The decree below will be reversed, and a decree ordered to be entered for the complainants.

Livingston, J., and Story, J., dissented.

Decree reversed.