1785.

STEWART, &c. v. DUNLOP, &c.

a penalty; and, in aid of the personal, a real security was granted by the same instrument, and then conveyancers, without attending to the alteration or change of circumstances, kept up the form of annexing penalties to the nonpayment of the interest, while they also annexed their penalty to the nonpayment of the debt in general. 3d, But further, acting upon those principles, and dealing with it as an error, the Court of Session have refused to sustain action for penalties, when they are included in the accumalated sum of apprising and adjudications, and have, in all cases, considered it as a *pluris petitio*, sufficient to destroy the diligence in law, and to restrict it to a security *in equity*. And several decisions support this proposition, Orrock *v.* Morrice, Stair, 29th Nov. 1677; Craig *v.* Park, 15th Nov. 1771, and other cases.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellant, *Alex. Wight, Wm. Adam.*
For Respondents, *Ilay Campbell, Ar. Macdonald.*

JOHN STEWART & Co. Merchants, Greenock, *Appellants;*

JOHN DUNLOP & Others, Merchants, Glasgow, *Respondents.*

House of Lords, 8th April 1785.

INSURANCE.—Circumstances in which presumed knowledge and concealment of arrival of news of the capture of the vessel insured, before the insurance was effected, held to vacate the policy.

The appellants, merchants in Greenock, had been trying to effect an insurance on their ship Peggy, and cargo, for her voyage from St. John's, Newfoundland, to St. Lucia, but had not succeeded in doing so at the premium offered, 15 guineas per cent., until the West India mail arrived, which brought accounts that the French fleet had made an attack upon the island of St. Lucia in the month of May preceding, and had taken the island of Tobago, and that Barbadoes was threatened. This news appeared in the newspapers and Lloyd's List, but no accounts reached the appellants.

This made them more anxious to insure, and they were in correspondence with a house in Liverpool to effect that object; when Mr. Stewart went to Glasgow on the 15th Aug., and having consulted with an insurance broker, effected an insurance on ship and cargo for £2400, at 20 guineas per cent. premium. It turned out, that on the day previously, a ship (Henrietta) had arrived at Greenock from Halifax, which brought news of the capture of the Peggy. It was admitted by the appellant, that he was aware of this arrival, —at least that he had seen the vessel in the roads that afternoon (14th Aug.); but she having come from Halifax, a distance of some hundred miles from St. John's, and having no concern with her, he did not make inquiries, and that it was not known for some days after that she brought any such news. But, on the contrary, he stated he went to Glasgow on the 15th August, in ignorance of any such, and effected the insurance in *bona fide*. He left Glasgow for Paisley, and slept there all night, and did not arrive in Greenock until the 16th inst., when he, for the first time, heard of the capture.

The underwriters refused to pay the sum insured, and action was raised for that purpose, and counter action by the insurers, to have the policy set aside, on the ground of fraud, and because, as the Henrietta had arrived from Halifax at Greenock, on the 13th August, with one of the crew of the Peggy on board, bearing the accounts of the capture of that vessel, the news thereof was publicly known in Greenock a day or two before the date of the insurance; and, therefore, the said John Stewart must be presumed to have known the same.

The Judge Admiral, before whom the actions were brought, after proof was taken of these facts, gave judgment in favour of the appellants; whereupon the underwriters brought a reduction of his decree before the Court of Session.

Nov. 15, 1782.

The Court pronounced this interlocutor, "Find facts "and circumstances proven sufficient to instruct that the in- "surance made by John Stewart upon the ship the Peggy, "her freight and cargo, upon the 15th August 1751, would "not have been made, if the brigantine Henrietta had not "arrived in the road of Greenock upon the day preceding, "and brought intelligence that the above mentioned ship "had been taken; and find that the said John Stewart & Co. "have no claim whatever against John Dunlop and the

Jan. 23, 1784.

1785.

STEWART, &c. v. DUNLOP, &c. Feb. 11, 1784.

"other underwriters, upon the brigantine Peggy, her freight "and cargo, for payment of the sums underwritten, and in- "sured by them respectively, upon the policy of insurance "libelled, and therefore sustain the reasons of the said ad- "miralty decreet challenged." On reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought.

Pleaded by the Appellants.—The *onus probandi* that the appellant Stewart knew of the capture at the time he effected the insurance, lies on the underwriters. They sue to vacate the policy on this ground, which is no less a ground than fraud, and they must make good their assertions. The matter is too serious to the appellants, both on this account, and the magnitude of the interests at stake, to admit of presumptions, and to be influenced by anything but direct proof. When the proof is examined, there is no direct evidence adduced, to prove Mr. Stewart's previous knowledge of the capture of the Peggy. The underwriters endeavour to infer his knowledge from circumstances, but, in considering these circumstances, distinction must be taken between facts, which only amount to suspicion, and a series of facts so connected together, as to admit only of one conclusion; but there is nothing of the latter kind here. It is only proved, that a report of the capture of the ship was known to five persons in Greenock on the 14th August, but these witnesses expressly depone, that they had no intercourse or communication, directly or indirectly, with the appellants.

Pleaded for the Respondents.—Intelligence of the capture of the Peggy was, before the insurance was effected, matter of public notoriety in the town of Innerkip, which is within four miles of Greenock, and the place of John Stewart's residence. It was also known to the captain and crew of the Henrietta, who brought it, all of whom had easy access to the owner, Mr. Stewart, and the reason of its not being publicly talked of was, owing to the precautions taken by Mr. Boog, Mr. Stewart's friend, from all which, as well as the written letter not sent, but prepared to be sent to Liverpool, offering the 20 guineas premium, without waiting a reply to his previous letter to the same party, offering less premium. The legal presumption was, that Mr. Stewart was in the knowledge of the capture of his vessel. Besides, it was clear that a hint of the capture had been communicated to Walkinshaw, Stewart's confidential friend and brother-in-law,

and a meeting had thereupon taken place, whereupon the insurance was resolved on. It is impossible for Stewart to separate himself from these parties, and being in the knowledge of a fact, which they fraudulently concealed, the insurers were grossly deceived in the matter, and the policy consequently was annulled.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of, be affirmed.

For Appellants, *Tho. Erskine, Al. Wight.*
For Respondents, *Ilay Campbell, Wm. Adams.*

NOTE.—Unreported in Court of Session.

[M. 11,283.]

Mrs. MARTHA GROVE and Others, Creditors of the York Buildings Company, } *Appellants;*
SIR JAMES GRANT of Grant, *Respondent.*

House of Lords, 15th April 1785.

PRESCRIPTION—INTERRUPTION—SUMMONS—PARTIES CALLED.—The York Buildings Company had purchased the wood on the respondent's estate, and the greater quantity was delivered, when they became bankrupt. Having lodged a claim on their estate, it was objected to the claim, that the contract had undergone the long negative prescription, and that the summons, decree, and horning following thereon were inept, and, therefore, incapable of interrupting prescription, because the summons did not call the Company as a corporate body, in which name it was appointed to sue and be sued, by act of Parliament. Held, by the Court of Session, that these were sufficient to interrupt prescription. In the House of Lords reversed, without prejudice to the points decided, but with special remit to consider whether the contract as to the wood be now at this time in force, and the Company liable therefor.

The York Buildings Company having purchased from the respondent a quantity of trees, they granted, of this date, a bond for the price, amounting to £7000, payable in certain instalments, and at certain intervals and under a penalty, all specified in the contract of sale entered into and subscribed by the parties. Jan. 5, 1728.