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.

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The wood was to be cut to the extent of 60,000 trees; and only at times as it was required. Before the whole was cut, and only 5000 under the contract taken, the Company became bankrupt.

In 1780 a ranking and sale was brought of their estates, and Sir James Grant, a creditor under the above bond, lodged a claim, upon which he had raised diligence, and had,

Mar. 2, 1780. of this date, obtained adjudication. It was objected to this claim, that more than 40 years having elapsed from the date of the contract of sale, &c. the same was prescribed. Answer: Prescription was interrupted, by action raised in 1735 against the Company, and decree in absence obtained in 1736: Also horning raised thereon and charge given in 1740; and finally adjudication in 1780. Reply: The summons and decree and horning following thereon were not effectual to interrupt prescription, because the bond being granted by Hosey and Ewer for behoof of the Governors and Company of the York Buildings Company, the summons, instead of calling these parties, or calling the company, it "called as defenders "*John* Ashley, Esq., present governor "of the York Buildings Company, John Nicol, William Jack-"son, George Abel, Gilbert de Flures, *Richard* Fowler, and "Charles Portales, present Court of Assistants and Directors "of said company, *for themselves, and as representing the* "*whole proprietors of the said company.*"—And decree having gone out against the same parties, horning was raised, and charge given under the same description of parties.

The decree of constitution, 1736, therefore, not calling the company, by their incorporate firm, in which, by act of Parliament, they were appointed to sue and be sued, and not calling even the two partners, Hosey and Ewer, who signed the bond for behoof of the company, the same was void and null, and the horning following thereon, in 1740, was also inept on the same ground, and also because, when executed, of this date, these gentlemen were not in office, and no longer *the present* Governor and Directors; as by the constitution of the company, they had retired from office and given place to others: so that the whole proceedings being inept, were inoperative to interrupt prescription.

July 21, 1784. The Court, of this date, found "that the decree of con-"stitution at the late Sir James Grant's instance, with the "horning and execution following thereon, sufficiently in-"terrupt the negative prescription, and therefore repel the "objection made to the interest produced and claimed by

" the present Sir James Grant, and remit to the Lord Or-
" dinary to proceed accordingly." On reclaiming petition the Court adhered; and, in terms of the remit, the Lord Ordinary found " the present Sir James Grant a just and " lawful creditor to the York Buildings Company, for the " several accumulated sums contained in his adjudication, " and interest thereon mentioned, bygone and in time com-
" ing, and ordaining him to be ranked among the creditors " of the said Company in his proper place."

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—The contract on which the respondent founds his claim being prescribed, he is not entitled to be ranked as a creditor, unless he can show that the prescription has been interrupted by some legal document taken within 40 years. The decree in 1736 was not a good decree, nor the horning a good horning, because the summons, which was the foundation of both, did not call the company by its corporate name—the name in which, by the act constituting it a corporation, it was authorized to sue and be sued. They entered into the contract in their corporate name; and though the bond is founded on in the summons, yet the parties who signed that bond for behalf of the company are not even called. Further, the horning was specially inept, because it was raised, and the charge on it given in 1740, against the same directors as named in the decree of 1736, when these parties had ceased to be directors, and even after some of them were dead. As, therefore, the corporate firm was not charged, nor included in the horning, there was no proper or legal warrant for diligence to charge any one partner more than another, or to charge the new directors; or to charge the old as present directors, after they had ceased to be so. The proper course undoubtedly was, to call the corporate firm, and then, under this general name, to have presented a bill to the bill chamber for letters of horning, stating the change of directors, and craving horning to go out against the new directors in room of the old. The whole procedure, therefore, being inept, could form no interruption of prescription.

Pleaded for Respondent.—In citing the governor and assistants of the York Buildings Company who were in office at the date of the summons and decree in 1736, the company or corporate body were in effect duly called. And, consequently, if they were properly cited by the summons, they were regularly condemned by the decree, and charged

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by the horning, because the decree conforms in all respects to the summons, and the horning to the decree. The summons having called certain individuals of the company, decree could not go out against any other than those in the summons; nor could the horning proceeding on that decree go out against any other than those against whom the decree was pronounced. But even supposing the charge given to these old directors were exceptionable, still, by the law of Scotland, prescription would be interrupted by such irregular or informal charge; for, as the negative prescription is a presumption of payment, and as a judicial proceeding by summons, decree, and diligence totally negatives that presumption, any objection to the diligence or procedure in point of form, cannot destroy the evidence which negatives that presumption; besides, it is clear that Sir James Grant *did not intend* to give an informal charge, but a charge such as would enforce payment; so that, in so far as evidence of his intention to abandon or give up the debt is concerned, an irregular charge is just as strong a proof of a contrary intention, as a regular charge could possibly be; and therefore the presumption of payment or abandonment cannot hold; and the plea of prescription is therefore out of the question. While, on the other hand, charging any of the parties liable as proprietors, was sufficient to keep the claim open against the whole.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be *reversed*, without prejudice to the points therein decided. And further ordered that the case be remitted back to the Court of Session in Scotland to inquire "Whether any contract in question between the Gover-" nor and Co. of Undertakers for raising the Thames " Water in York Buildings and the late Sir James " Grant, be at this time subsisting in force, or the said " corporation in any manner chargeable thereupon." And it is further ordered, That the said Court of Session do proceed thereupon, and upon the rest of the cause hereby remitted, according to justice.

For the Appellants, *Ar. Macdonald, Alex. Wight.*
For the Respondent, *Ilay Campbell, William Grant.*

Note.—In Morison it is stated, "It is believed the suit was afterwards compromised."