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"and to do no fact or deed whereby the order or course of "succession might be altered or diverted." The entail here was entirely subversive of that obligation, because, besides prohibitions against selling, alienating, and contracting debts, and obligation to redeem adjudication, the father reserves power to himself to sell and dispose of the estate, to contract debt, and burden and affect the same at pleasure; and even to alter the entail itself. But all this could only proceed upon a mistaken notion of his powers, and a total disregard of that *jus crediti* then existing in the heir of the marriage; because where a father, by his contract of marriage, settles his estate upon such heir, he is bound to transmit it to him unencumbered and unprejudiced by any gratuitous or even onerous deeds. "He is not only heir but quodammodo creditor to his father." 2. Although a reserved power to execute a deed limiting the heirs with irritant and resolutive clauses was contained in the marriage contract, this did not authorize a power in the father to burden the estate with debt; because he was thereby expressly taken bound "to do no act or deed" to defeat the purposes of the marriage settlement, and the power reserved must always be construed subject to the express obligations.

Ersk. vol. ii. p. 561, § 38.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be *affirmed*.

For the Appellants, *H. Dundas, T. Erskine.*
For the Respondent, *Ar. Macdonald, Dav. Rae.*

NOTE.—This case not reported in Court of Session.

(M. 7085.)

JOHN THOMSON, Jun., Merchant, Leith, *Appellant;*
GEORGE BUCHANAN and Others, Underwriters, *Respondents.*

House of Lords, 13*th March* 1782.

INSURANCE—CONCEALMENT.—Circumstances in which it was held that where a letter of advice is concealed from the insurer, which only refers to matters of public notoriety, known to all insurance offices, as affecting the risk in insuring a particular voyage, that such concealment will not void the policy.

The appellant insured his ship Gizzy for Gibraltar with orders to the Captain to proceed from thence to Malaga,

and back to Leith, and to inform him on his arrival at Gibraltar, in order that an insurance might be effected on the vessel from Gibraltar to Malaga, and from thence to Leith. On arrival at Gibraltar, the captain accordingly informed the appellant of this by letter, and also acquainted him Sept. 28, 1778. "that there is as much danger in going from here to Mala-
"ga, as coming from England here. I hear that merchants
"at Malaga wont ship any goods on board of English ships
"before they hear of a convoy to take them from here. I
"am going to write to Ferry to-morrow by post, to hear
"what he thinks of it; for there is a great many ships at
"Malaga that is chartered, and the merchants wont ship on
"board of them. They are shipping on board of Spanish
"ships for London. I shall write my wife by next post, and
"by that time I shall be able to give you a more full ac-
"count of things how they are."

Upon the receipt of this letter, the appellant applied at London and Glasgow to know the premium at which they would insure the vessel, but the Mediterranean being then swarming with French privateers, none would do it but at an exorbitant premium. After a good deal of delay, an insurance was effected with the respondents in Glasgow, at the high premium of 25 guineas per cent. The policy was for £600, and bore to be on the ship from Malaga to Leith, with liberty to call at Gibraltar, it being particularly mentioned that the last advice was from Gibraltar of the 28th September 1778; that the vessel had arrived there safe only the day before, and had a cargo to discharge, and if she sailed with convoy from Malaga or Gibraltar to England, and arrived safe, 5 per cent. should be returned.

The letter of advice above quoted was not shewn to the underwriters; and on the evening of the same day on which the insurance was concluded at Glasgow, the appellant received a letter at Leith, dated from Almeira, 21st October, 1778, informing that the ship having sailed from Gibraltar to Malaga on 9th October, was taken by a French privateer, off Malaga, and carried into that port. This letter was immediately communicated to the insurers, and claim made for the loss; which being refused, action was raised before the Admiralty Court for payment.

In defence to this action, it was stated that the appellant ought to have laid before them the before mentioned letter from the captain, because it contained material intelligence which ought to have been communicated, but which was

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concealed, and that the letter to the captain's wife was also concealed.

The above letter was produced, and the appellant examined, who deponed that he had received no other advice as to the ship, and Lamb, the captain, and his wife were also examined as to the letter alleged to be sent to her, which turned out to be a mistake, as none such was sent.

Mar. 3, 1780. The Judge Admiral, after having allowed a proof, to shew that, prior to the date of the policy (26th Nov. 1778) the appellant knew of the ship having been taken as a prize, and this not having been proved, decerned against the insurers for payment of the sum insured. A suspension being brought of the Admiral's decree to the Court of Session, it came before the Lord Justice Clerk Ordinary, and his Lordship ordered informations with the view of reporting to the
June 20, 1781. Court. The Lords, of this date, on considering these, "suspended the letters simpliciter."

Against this interlocutor the present appeal was brought.

Pleaded by the Appellant.—It is quite true that the party insuring must communicate to the insurers every fact within his knowlege *material* to the risk, and material to guide the latter in fixing the premium at which they will insure; but it was not necessary for the appellant to communicate the contents of the captain's letter, because the facts in the letter received were matters of public notoriety, known to every insurance office in the country, and already known to the respondents, as is proved by the high premium they took. The only fact which the letter communicates is the date of her arrival at Gibraltar. It communicates no other intelligence of additional risk or danger other than that which, from the war with France, was well known to exist. And the allusion in the letter to merchants not sending their goods in English ships without convoy, was plainly intended to show how unlikely it was that the ship would get a freight at Malaga, than any danger from the enemy; but the captain was evidently hazarding his own opinion, not so much upon actual knowledge of the fact, as upon mere speculation as to the dangers, because he closes by stating that he would write to Mr. Ferry for information. But to hold that this letter does not simply refer to the French privateers, and to the dangers necessarily arising from the war in which France and Britain were then engaged, facts already known to the respondents, is to subvert the whole meaning of the letter, and the contract between the parties.

Pleaded by the Respondents.—The suppression or concealment of material intelligence, whether fraudulent or not, vacates the policy. Insurance being a contract of good faith, the appellant was bound to communicate the captain's letter (which evidently represented the risk of the voyage greater than he had expected, and was written to guide him in the insurance,) in order to allow them to judge aright as to premium at which they would or should insure. He not having done this, and not having communicated its alarming intelligence, the respondents were deceived and induced to take a more moderate view of the risk, and to charge lesser premium accordingly, by which concealment the policy is void.

After hearing counsel, Lord Mansfield moved that it be

Ordered and adjudged that the interlocutor of the Court of Session be *reversed*, and the decree of the Judge Admiral, decerning for the sum in the policy, be affirmed.

For Appellant, *Henry Dundas*, *J. Dunning*.
For Respondents, *Ja. Wallace*, *Ar. Macdonald*.

(Mor. 10,706.)

ANDREW WAUCHOPE and Others, - *Appellants*;
YORK BUILDINGS COMPANY, - - *Respondents*.

House of Lords, 22*d April* 1782.

NEGATIVE PRESCRIPTION.—Party pleading it must have an interest.

For particular report of this case, see Morison, p. 10,706.

Circumstances in which the negative prescription was pleaded against four old bonds, but held not to apply, in respect that the party pleading it had no interest to plead the negative prescription. Jan. 3, 1781.

The case was appealed to the House of Lords. After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellants, *J. Maclaurin*, *Alex. Murray*.
For Respondents, *G. B. Hepburn*, *Ilay Campbell*.