Saturday, July 18.

FIRST DIVISION.

[Lord Young, Ordinary.

APPEAL—PHOSPHATE SEWAGE CO. IN LAWSON'S SEQUESTRATION.

(*Supra*, p. 359.)

Sale—Joint Stock Company—Fraud.

A party obtained a concession from a foreign government to work certain guano islands, and worked it in conjunction with a Scotch firm, who, after spending a considerable sum on the works, sold their interest to him. He thereupon formed a company to work the concession, and in doing so used the name of the firm with the object of pushing the shares in the market. The firm shortly afterwards became bankrupt. *Held* that the company was not entitled to recover from the estate of the firm the price paid for the concession, on the ground of fraud and misrepresentation. *Held* that in the circumstances the firm had not been guilty of fraud or misrepresentation.

The facts of this case have been already reported, *ante*, p. 359. The Court having remitted to the Lord Ordinary to take a proof, it was taken before Lord Young, who pronounced the following interlocutor:—

"2*d July* 1874.—The Lord Ordinary having heard counsel, reports the proof and whole case to the First Division of the Court, and grants warrant to enrol in the Inner-House Rolls.

"*Note.*—Had I been at liberty to follow my own judgment in this case, I should have recalled the deliverance of the trustee, and remitted to him to set aside a dividend to abide the result, as regards the bankrupts, of the suit in Chancery, referred to on record; but the interlocutors already pronounced, whereby the first and second pleas for the appellants have been repelled, and a proof allowed on the merits of their claim, are an impediment, though I think not an insuperable impediment, to this course, should it be thought, now that the character of the case is more fully disclosed, that it is expedient; but being of opinion that it is in the circumstances fitting that the Court should judge both of the competency and expediency of disposing of the case otherwise than they contemplated, and indeed directed, when the case was before them on the record alone, I have reported the whole matter for their consideration and judgment. I am disposed to regard the interlocutors to which I have referred as relating to procedure merely, and therefore such as may be departed from at any stage of the cause, if the Court shall, on further consideration or more mature consideration, think it expedient to do so. The pleas in law which have been repelled are pleas relating to procedure. Therefore, although I deem it proper on my part to refer the whole matter to the Court, I shall not hesitate to state distinctly my opinion as to the proper course of procedure, notwithstanding that it greatly differs from that formerly entertained and expressed by the Court, and which possibly they may see no good ground for changing now.

"The claim of the appellants is for the sum of £65,000, alleged to have been paid on 31st May 1871 by 'the said Company' (the appellants), 'for the concession of the Island of Alto Vela by the Dominican Government to the deponents (should apparently have been the bankrupts), or to others at their request,' with interest to the date of the sequestration.

"The appellants are an English company, with an establishment, and so far as appears their only establishment, in London. The sale of the concession referred to in the claim took place in London, and was effected and completed by English deeds executed in London. The ground of the claim is that the sale was induced by fraud committed by various persons (including the bankrupts) acting in combination, so that, as expressed in the prayer of the bill in Chancery, it ought to be declared that the same 'was fraudulent, and ought to be set aside,' and that 'the Company ought to be relieved of the consequences thereof.' These consequences were the payment, on 21st May 1871, of £65,000 out of the funds of the Company 'to the bankrupts, or to others at their request.' The directors who paid the money are alleged to have been parties to the fraudulent combination; and, accordingly, it is further prayed (in the bill) that it shall be declared that it was a breach of trust on their part 'to pay the sum of £65,000 or permit the same to be paid in manner aforesaid out of the funds of the plaintiff Company for the purchase of the said concession,' and that the whole parties to the fraudulent combination (including the bankrupts), 'are jointly and severally liable to make good to the plaintiff Company the said sum of £65,000, with interest."

"The appellants assert on the record (Condescendence 22), that the facts entitling them, as they conceive, to have the sale set aside as fraudulent, and to be relieved of the consequences thereof, only came to their knowledge in October 1872, up to which date the bankrupts 'had studiously and successfully concealed them.'

"The estates of the bankrupts, who were traders in London (where they had an establishment and a resident partner), as well as in Scotland, were sequestrated under the Scotch Bankrupt Act on 11th February 1873. The appellants had not at that date resorted to legal proceedings to have the sale in question set aside and to be relieved of its consequences; but having such proceedings in contemplation, they, on 14th March, lodged a claim with the trustee, in order to secure a dividend in the event of success, and I should not have doubted the propriety of their doing so without any intention on their part of submitting to the judgment of the trustee the question of their right to be relieved of the sale and its consequences. On 19th April they filed a bill in Chancery, and, without indicating an opinion on the merits of their case, I think it clear that they resorted to the proper and only proper Court to adjudicate upon it. They were an English company desiring to set aside and to be relieved of the consequences of a sale made to them in England by English parties, and through the instrumentality of English deeds, on the ground of fraud committed in England by various English parties acting in combination there. The case presented, having regard to the parties interested, the facts involved, and the law applicable, seems, on the face of it, to be altogether an English case. I cannot think it for a moment doubtful that the appellants resorted to the proper tribunal, nor am I able to attribute to them undue

delay in resorting to their remedy, so as to raise any specialty on that head. I don't know why the claim of 14th March should have been withdrawn, and replaced by another in the same terms on 24th June, unless it may have been some notion (I think unfounded) that the appellants would stand better with a claim dated subsequent to their suit. But disregarding that as a trivial matter, and considering only the proper course to be followed in the circumstances, I find myself unable to assent to the notion that the bankruptcy of the Messrs Lawson and the sequestration in Scotland of their estates affects the jurisdiction of the Court of Chancery to determine whether or not the sale in question was fraudulent, so as to entitle the appellants to have it set aside, and to be relieved of the consequences by the parties to the alleged fraud. To suppose that such a question should be submitted to the judgment on its merits of the trustee in the Messrs Lawson's bankruptcy, is simply absurd. The Lord President says—and I quite agree—that it is not to be supposed that the trustee could 'make such an investigation as would satisfy him regarding a claim of this peculiar nature. That is beyond what is to be expected of him.' I think the appellants took the right view of their position when they regarded it as that of contingent creditors, the contingency being, that the proper Court to which they had resorted (or were about to resort without undue delay—for I can make no distinction) should set aside a sale on the ground of fraud, and find them entitled to be relieved of the consequences by the perpetrators of the fraud, including the bankrupts, to the amount, as regards the bankrupts, of the sum stated in their contingent claim. In this view of their position they craved that a dividend should be set aside. The trustee was no doubt entitled to consider whether the claim, though thus stated as contingent, was feasible, and not on the face of it inadmissible, or a mere pretence to delay proceedings in the bankruptcy; but if he had no reason—and I think he certainly had none—to regard it otherwise than as an honest claim, the grounds and foundations of which were *sub judice* in the proper Court, I cannot doubt that his duty was to set aside a dividend. The trustee, erroneously in my opinion, rejected the claim, of which he was admittedly incompetent to judge, and which was at the time *sub judice* of a Court proper and competent to judge of it. On appeal against this (I think, erroneous) deliverance, the Lord Ordinary and the First Division of the Court decided that the trustee had done right in rejecting the claim, not because he was satisfied regarding it, which was not to be expected of him, but in order to 'allow the appellants to bring it here, and have it determined in the ordinary course.' Had he dealt with it as a claim contingent on the result of the Chancery suit, and to set aside a dividend, there would have been no appeal, and it would have been determined, not here, but in the Court of Chancery in the ordinary course. The appellants urged that this was what he ought to have done, but the Court thought otherwise; the Lord President, apparently with the concurrence of the other Judges, observing, 'Why it should be supposed that an investigation here would be less satisfactory than one in the Court of Chancery I am at a loss to understand.' I do not, of course, question the competency or ability of this Court to investigate satisfactorily a case depending on English facts and English law, and involving other interests than those with regard to which the accident of a sequestration has given it jurisdiction; but when, as here, such a case is actually depending in an English Court, with all the parties interested before it, I am at no loss to understand why the proposal that there should be a separate and independent investigation in this Court with respect to one of the parties whose estates happen to be under sequestration here should not have been regarded with satisfaction. It involved two litigations on the same subject, one of them in a Court which does not administer the law applicable to it, and which has not jurisdiction over all the parties interested, but over one of them only, and that as the result of an accident. It was impossible not to contemplate the risk of conflicting decisions, or to avoid foreseeing that in this event an appeal to the Court of last resort would be irresistibly forced on one or other of the parties, so that, however this Court or the Court of Chancery might decide, the litigation here would be altogether fruitless. These are, I think, forcible considerations, and such as leave no room for surprise that the appellants should have resisted an investigation in this Court. I may be wrong in supposing that the appellants are serious in the prosecution of their Chancery suit, but having no reason to doubt it, I think I must, in justice to them, assume that they are. But if so, and if the Court of Chancery has jurisdiction over all the defendants, which the Lord President says he takes for granted, it seems nearly certain that the investigation here must be fruitless, and the expense of it absolutely thrown away. Should the decision be against the appellants, they will of course keep the matter open by an appeal, and should it be in their favour, it is highly improbable that the trustee and the creditors will discontinue their defence in Chancery, and if not, *they* will of course keep the matter open by an appeal. Conflicting decisions, both being allowed to stand, and each having execution and effect within the jurisdiction and territory of the Court that pronounced it, would be a scandal; and I assume that all available means will be taken to avoid it.

"The Lord President, taking for granted the jurisdiction of the Court of Chancery over all the defendants, entertained 'great doubt whether any decree of that Court could affect the proceedings in this sequestration.' If this means that it is greatly doubtful whether a decree of the Court of Chancery in the due and orderly exercise of its jurisdiction can be received as a valid constitution of a debt with a view to ranking in a Scotch sequestration, I must express my dissent, and say distinctly that in my opinion there is no ground whatever for such a doubt. If the appellants were to present to this Court a decree of the Court of Chancery in the now pending suit against the bankrupts for the amount of their claim, or any amount within it, I think it clear that the Court would be bound, and would not for a moment hesitate, to give it effect in the sequestration. So, on the other hand, I think it also clear that a decree of absolvitor in this suit in favour of the bankrupts would equally receive effect in the sequestration as absolutely conclusive against the appellants' claim for a ranking. These propositions are to my mind so clear, and they are so

fundamental in the just consideration and decision of the present case, that, great doubt having been expressed regarding them, I deem it proper to state my own opinion upon them distinctly. In substance the appellants' case is this—that according to the law of England, as administered by the Court of Chancery, and which governs the whole deeds, transactions, and proceedings on which their claim is founded, they are entitled to have the sale referred to set aside as fraudulent, and to be relieved of the whole consequences thereof, with decree against the bankrupts, conjunctly and severally, with the other parties to the fraud, for £65,000, with interest, as the price paid for the subject fraudulently sold. They desired no adjudication by the trustee on the merits of their claim (to have done so would admittedly have been absurd), but only that a dividend should be set aside to abide the decision of the Court of Chancery in the suit they have instituted. In this Court they have consistently maintained the same view of their position as contingent creditors, their debt being contingent on the success of their English suit.

"I have read, with respect certainly, but I confess also with surprise, Lord Shand's opinion, to the effect that all action at the instance of a creditor to constitute his debt is absolutely excluded by clauses 126, 127, and 169 of the Bankrupt Act, unless it may be under very special circumstances and 'by arrangement, or on the call of the trustee.' I may remark that if the clauses of the Act really bear the construction supposed, whereby action is incompetent, this construction cannot be effected by arrangement or the call of the trustee. If the question is put as one, not of competency, but of expediency, I agree, and think that the Court will not allow action to constitute a claim which a trustee can properly deal with under the Act. It is matter of common practice to sist the trustee in actions brought against the bankrupt before sequestration, the pursuers having dividends set aside for them as contingent creditors. The construction sought to be put on the Bankrupt Act would exclude this practice as incompetent; for that construction is that every claim for a ranking must be judged of on its merits in the sequestration itself, by the trustee, or the Sheriff, or Court on appeal from his judgment. Upon the question of expediency, there may or may not, according to circumstances, be a distinction between an action brought before and one brought after the sequestration. Cases in which there would clearly be none crowd on the mind. Suppose a claim by a joint-stock bank against a body of directors, conjunctly and severally, to reduce and set aside certain proceedings as fraudulent, and for the restoration of funds fraudulently misapplied, and that one of them has been sequestrated immediately before the action was brought, it is doubtful that the Court would allow the bankrupt director (with the trustee) to be included in the action in preference to the only other alternative of requiring that there should be a separate litigation with respect to him, with a distinct and independent record and trial in the appeal against the trustee's judgment? In the result, no doubt, every claim for a ranking, however it may be constituted, must be admitted or rejected by the trustee subject to appeal; but this consideration does not touch the question of the competency of constituting a claim by action, or the expediency of allowing or even peremptorily requiring, as a condition of receiving it, that it shall be so constituted, when that is the proper course, as it clearly must be in many cases—for example in claims of damages.

"In the note appended to the interlocutor of 13th February, Lord Shand observes, that 'it is contended by the respondent (the trustee), under reference to sections 126, 127, and 169 of the Bankrupt statute, that an action such as the appellants' suit in the Court of Chancery in England would be incompetent in this Court, and that even if the suit should be proceeded with in England, any decree pronounced in it could receive no effect, because the respondent in administering the estate under the Bankrupt statute is bound to adjudicate on the claims of the different creditors lodged with him (as he has done in the present instance); and the only remedy which creditors have under the statute to enable them to obtain a share of the bankrupt's estate is an appeal against the trustee's deliverance, if the creditor's claim has been rejected,' and his Lordship gives the support of his authority to this contention. Now, while I agree that a party claiming a dividend cannot have it unless the trustee or the Court on appeal shall admit his claim, I am unable, for the reasons stated, to assent to the proposition that an action equivalent to the appellants' suit in Chancery would be incompetent in this Court, and that the decision in such action sustaining or rejecting on its merits a claim on which a party has founded in a sequestration, 'could receive no effect' from the trustee or Court of Appeal in the bankruptcy proceedings. Were a sale in Scotland challenged by the purchasers on the ground of fraud, perpetrated in Scotland by parties acting in combination here, I apprehend that an action of reduction, with suitable conclusions against the fraudulent parties, conjunctly and severally, for restoration of the price, would be competent, and substantially equivalent to the appellants' suit in Chancery. Further, assuming the bankruptcy and sequestration of one of the parties to the fraud, I am unable to think it doubtful that he and the trustee might competently be called as defenders along with the others against whom decree was sought. It would, unquestionably, be a serious blemish in the Bankrupt Act if it necessitated a separate litigation with respect to one of several parties to a combined fraud, if he happened to become bankrupt and be sequestrated. It has not hitherto, so far as I know, been suggested that the Act was open to this reproach. Two litigations on the same subject, proceeding at the same time, one in an action so far as regards the solvent defenders, and the other in an appeal against an almost *pro forma* and matter-of-course deliverance of a trustee in bankruptcy as regards one who has been sequestrated, would be a scandal. But the consequences of such a construction of the Act would not stop even here, for the construction would lead to this, that if several individuals of a body of alleged fraudulent directors, or any other body of persons alleged to have in combination committed an injurious fraud, became bankrupt and were severally sequestrated, a separate and independent record and litigation would be a statutory necessity in the sequestration of each. In opposition to all this, I venture to suggest, as the legal and reasonable view, that where the ground of a claim in bankruptcy is of such a character that it is fitting it should be constituted by action, and an action either has been

brought or is undertaken to be brought forthwith for the purpose—and there is no reason to doubt the good faith of the undertaking—the claimant is entitled, and ought to be regarded as a creditor claiming on a contingent debt, and to have a dividend set aside. Should the action, if brought, or the ground of claim alleged as the subject of an intended action, be absurd on the face of it, the trustee may in his discretion deal with the matter accordingly; but a party who is in good faith, pursuing a probable or feasible ground of claim before a Court of competent jurisdiction, is, according to my clear opinion, a creditor in a contingent debt within the meaning of the Bankrupt Act, and ought not to be required to engage in a separate and fresh litigation in the sequestration following on the bankruptcy of any one or more of the parties against whom his action is directed, but ought to have a dividend set aside to await the contingency in any sequestration in which, according to the common rules of law, decree in his action would constitute his debt, so as to entitle him to be ranked for a dividend.

"Applying these views to the present case, I think it is clear on the record and evidence that the appellants are in good faith (and on grounds which I cannot characterise as so absurd or improbable that success cannot be contemplated as a reasonably possible result), seeking in the proper, and I think only proper, Court to have the sale referred to set aside, and the bankrupts and others, by whose fraud, committed in combination, it was effected, found liable to restore the price. I state this as my opinion upon the evidence and productions as well as on the record, for it is conceivable that these might have exhibited the case and position of the appellants in such a light that they could not be regarded as honestly seeking to establish in the proper Court a claim of a probable or feasible character, and therefore entitled to have their claim in the sequestration dealt with as one which it was at least not unreasonable to suppose they might succeed in establishing. It would not not have occurred to me, on considering the record, to doubt the integrity of the appellants and the good faith of their proceedings, and I should therefore have been prepared to deal with them as contingent creditors without ordering a proof, but a proof having been taken, it is proper to say that it does not shake, but confirms, the opinion of their position which I should have formed on the record alone.

"Should the Court resolve to decide upon the merits of the appellants' claim, I must confess with regret my inability to aid them in forming a judgment by the expression of any opinion, for I have felt myself incompetent to form an opinion on the question which is at the very foundation of the claim, namely, whether or not the appellants are entitled to have the purchase of the concession set aside on the head of fraud, and to be relieved of the consequences thereof. To set the purchase aside is of course beyond the jurisdiction of this Court, and for my part I am unable to say how the Court of Chancery, which has jurisdiction in the matter, ought or is likely to exercise it. If it were necessary (as under certain circumstances it might be) to form an opinion on the question, I think this Court would require information as to the law of England, either in the form of an opinion or evidence, or by stating a case under the recent Act for the opinion of an English Court. Should the latter course be taken, we might possibly be told that the very case being actually depending in the Court of Chancery we must await its judgment, and counsel could hardly advise us, except subject to correction, by the decision in that pending suit. I have, however, no hesitation in saying that the appellants' case against the bankrupts and others appears to me to be of a serious character. It is not alleged that they deceived the parties with whom they actually and directly transacted—these parties being themselves in the alleged fraudulent combination; and this may possibly be found to create an insuperable legal difficulty. The case alleged is that the projectors or promoters of the Company, the provisional committee, the original directors, and the bankrupts, all acted in combination to commit a gross fraud on those who now constitute the Company, and that they accomplished their purpose to the effect of taking £65,000 of the Company's money for a concession known to be worthless. The case against the bankrupts in particular is, that having, in March 1871, sold the concession, (or rather their chance of making money of it through the Company then in course of being got up) to Mr Hartmont for £17,000, they, in April and May following, professed to sell the concession to the Company for £65,000, and falsely and fraudulently represented and published, or allowed it to be represented and published, that they had expended £39,000 on the Island of Alto Vela. It is further alleged against them that at the date of the sale the concession was, as they knew, voidable at the pleasure of the Dominican Government, and that they not only concealed this, but by their assignation represented aud covenanted to the contrary. I cannot regard this as other than a serious case, and in its main features it seems to me to be true in fact, although I should not be prepared on the evidence adduced to find that the bankrupts were actuated by any distinct fraudulent purpose with a view to their own advantage, or to impute to them any greater misconduct than that of allowing themselves to be put forward as sellers, and statements to be made in their name after they ceased to have interest, by those who had the real interest in the success of the scheme on foot. I am averse to express an unfavourable opinion of the conduct of parties who are defending themselves elsewhere, and are not before this Court; but if I am to state the impression made upon my mind by the evidence, I can hardly avoid it, and I certainly have an impression produced by the evidence that the Company was conceived and created as a scheme to defraud the public, the schemers themselves being the original partners, and the fraud being perpetrated by giving a specious but false appearance to the Company as being the proprietors, by purchase from the Messrs Lawson (then a well-known firm) of the concession by the Dominican Government, at the price of £65,000 paid to the Messrs Lawson for it, the truth being that the Messrs Lawson had previously sold it (or any chance of making money of it through the scheme) for £17,000, and that they were not the real sellers, but only for a deceitful purpose pretended to be the sellers to the Company for £65,000. The consummation of the fraud was effected, as it was intended from the first it should be, by the combination of schemers, who had the shares in their own names or those of their nominees, selling them to the public in the market, and so themselves getting out of the concern with the money of those whom

they persuaded to come in. £65,000 of the money so obtained was pocketed by them as the price of the concession which they had made to stand on the books as an investment to that amount, although not truly of any value. The part which the bankrupts had in the accomplishment of this scheme I have already noticed. Whether, in such circumstances, the law of England (where everything occurred) will afford a remedy, or whether the appellants are seeking a right remedy, I am unable to decide. I only think that the bankruptcy of the Messrs Lawson cannot affect the question further than this, that only such dividend as their estate affords can be obtained on any claim established against them, and that a claim, if established, can only have effect given to it here.

"I observe that the trustee disputes the jurisdiction of the Court of Chancery. His objection will probably be disallowed, for I agree with the Lord President in thinking that the Court of Chancery has jurisdiction over all the defendants; but should the Court agree with me in thinking that the decision of the Court of Chancery ought to be waited for, and when given respected and followed, in disposing of the claim on the bankrupt estate, the trustee will, no doubt, under the direction of the creditors, see that the interests of the estate are properly represented and defended."

The case accordingly came before their Lordships on the proof.

At advising—

Lord President—My Lords, the memorandum of association of the Phospho Sewage Company—the appellants and claimants in this case—is dated 1st May 1871, and registered on the 6th of the same month. They claim in the sequestration of Messrs Peter Lawson & Sons a sum of £65,000, as being a debt due to them by the Messrs Lawson at the date of their sequestration, with interest at 5 per cent. from 31st May 1871 to the date of the sequestration, amounting altogether to £70,529; and the affidavit on which this claim is made sets out that these sums are due and owing by the bankrupts under the circumstances set forth at length in a bill of complaint in Chancery—filed on the 19th April 1873—between the Phospho Sewage Company and a variety of other persons therein named; and they further depone in common form that no part of this money has been paid or compensated to them in any way, and that they hold no security over the bankrupts' estate. This sum of £65,000 is said to be the price paid under a certain contract of sale, in which the Messrs Lawson stood in the position of vendor and the Directors of the Company in the position of vendees; and the claim is made upon the footing that the sale is reducible, and may be set aside upon the ground of fraud.

Now, to deal satisfactorily with the question which has thus been raised it is necessary to attend to the history of the proceedings upon which this sale arose. It would appear that in the year 1868 a person of the name of Hartmont,—whose name figures in the history of this case in a not very creditable way,—had obtained a concession from the San Domingo Government of the phosphates and other similar substances in the island of Alto Vela, and the Messrs Lawson, who were naturally very much interested in all substances that could be used as manure, and who had at the time a great many speculations of their own of that description, came in contact with Mr Hartmont, and agreed with him to work those substances in the island of Alta Velo, and ship them to this country. The agreement which was made between those parties was on 1st December 1868, and the existing concession in favour of Hartmont was dated in the month of May preceding. But there was a new concession obtained in the following year, and it is not disputed that that concession fell under the agreement between Hartmont and the Messrs Lawson. The result was that Messrs Lawson worked the island of Alto Vela during the whole of the year 1870 and a part of the year 1871. They expended undoubtedly a very considerable amount of money upon it, and the returns do not seem to have been in proportion to the expenditure. In short, they were not making money by it, and they became desirous in consequence to dispose of their interest in the island, and to obtain in that way repayment of the large expenditure which they had made. It appears quite evidently from some of the letters, and also from the parole evidence, that at this time the Messrs Lawson were in difficulties. It does not appear that they were insolvent, but they were certainly in want of money, and therefore they found that the large expenditure which they had made on this Alto Vela undertaking was a very great inconvenience. I see that so early as 17th October 1870 Mr Graham Lawson had suggested the formation of a joint-stock company to take up this concern, which he thought a very good concern, and one likely, by application of sufficient capital, to prove very profitable and advantageous. That is the first suggestion of a company being formed for that purpose; and I am bound to say that in that letter of 17th October, written by Mr Henry Graham Lawson, I do not see the suggestion of any thing improper or fraudulent,—the object being to get up a company for the purpose of taking over this undertaking upon fair and equitable terms. Mr Hartmont, however, had a very considerable interest and influence in this matter, because he was the person to whom the concession had originally been made by the San Domingo Government, and he still retained under his agreement with Messrs Lawson a considerable interest in the affair. And it becomes apparent, as we trace the history of those proceedings, that in the course of 1871 Mr Hartmont, either alone or with some of his other friends who are mentioned, conceived the project of getting this Alto Vela concern and the proposed company very much into his own hands; and I am very far from saying that in the proceedings which followed Mr Hartmont and some of his friends did not commit a very clear and gross fraud upon the public. But it rather appears to me that if it had not been for the ultimate object which Mr Hartmont had in view, and which he achieved with great success, viz.,—bringing this company out with the requisite number of shares having been subscribed to entitle him to go into market, and by misrepresentation obtain from the Stock Exchange a settling-day and quotations, and then getting up the value of the shares in the market by fraudulent representations and deceit, and then selling out at a high price;—if these things had not followed upon the history I am now tracing, I do not very well see there would have been any fraud upon the public at all; because merely to convert this Alto Vela undertaking into a joint-

stock company, got up in good faith and in regular form, would have been certainly nothing wrong in itself. The course of Mr Hartmont's proceedings may be seen very well from some letters which passed in the months of March and April 1871, in which he contrived to buy off Messrs Lawson, and certainly bought them off for no very large amount, considering the great expenditure that they had made upon Alto Vela. It comes to this, that he pays them £10,000 in cash and £2,300 in acceptances, and stipulates that they are to have in addition to that 500 shares in the company which is to be formed, representing £5000,—in all, £17,300; and for that amount he acquires the whole right and interest of Messrs Lawson in the concession. Subsequently, however, Messrs Lawson being much in want of money, the £5000 worth of shares which they were to have is also converted into cash, Mr Hartmont first of all advancing £3000, and then an additional £2000, and Messrs Lawson undertaking to hold the 500 shares, when they come to be assigned to them, for behoof of Mr Hartmont. Now, after this the sale takes place which is said to be fraudulent, and the deeds which pass between the parties are, in the first place, a deed dated 20th April 1871, in which Mr Hartmont and Mr Begbie assign the concession to Messrs Lawson, and then a deed of 28th April 1871, by which Messrs Lawson sell and assign to Engelbach and Keir, the persons who were promoting the Company, and then afterwards, when the Company is formed, there is a regular deed of transfer by the Lawsons to the Company. Now, it is said that there is fraud in the way in which this transaction was carried through, because, in the first place, the subject of the conveyance had really no existence,—it had been lost or forfeited before it was made the subject of conveyance. That appears to me to be entirely a misunderstanding of the position of affairs at the time this conveyance was made. No doubt, in the concession, the parties, the concessionaries, undertook to ship 10,000 tons of phosphate and other similar substances from Alto Vela in the course of every year, beginning on 1st January 1870, and the San Domingo Government stipulated that if that obligation was not performed they should have the option of declaring the concession void and making it void. During the year 1870 there certainly were not 10,000 tons shipped, and therefore it may be assumed that at the end of that year the San Domingo Government had the option of declaring the concession to be void, and so putting an end altogether to the rights of the concessionaries. But they did not do so. On the contrary, they allowed the Lawsons to go on after 1st January 1871 shipping material from this island of Alto Vela; and then, after the company was formed, and when the concession had been transferred to them, they also allowed them to go on shipping for a very considerable period. The amount shipped by the company was, I think, 15,000 tons: and all that goes on without any attempt upon the part of the San Domingo Government to exercise their right of declaring the concession to be void, and without there being any remonstrance upon their part as to the small shipments which had been made, until somewhere about the month of October 1872. It appears to me, therefore, that at the date of the contract of sale in May 1871 this concession had certainly not been lost. I think it is extremely doubtful, to say the least of it, whether, after the San Domingo Government had allowed the concessionaries to go on shipping after 1st January 1871, and taken their royalties upon the cargoes shipped, they were entitled still to come forward and say—"Because of the deficiencies of shipments in the year 1870 we will now put an end to this concession." If it were necessary to go into that subject at all, I should say most undoubtedly that they were not entitled to do so,—that they had lost their opportunity by allowing the shipments to go on, and taking royalties upon these shipments. Of course, if at the end of 1871 there was again a default in the amount of shipments, they might again have the right or option of putting an end to the concession; but they could not, I think, after May 1871, when this sale took place, proceed upon the deficiencies of the year 1870 as a ground for annulling the concession. But even supposing that were not so clear in point of law as I think it is,—there does not appear to have been any desire on the part of the San Domingo Government to exercise the right they had. On the contrary, from every thing we see they were very anxious to go on with the contract they had made with those English traders; and the communications which passed between the Secretary of the Phospho Sewage Company and the representative of the San Domingo Government show that the San Domingo Government was very anxious that they should go on, and go on, of course, on the footing that for the future they should comply with the obligation in the contract of shipping the full amount of 10,000 tons a-year. So that the fraud said to have been committed in this transfer and sale, by selling a thing that had really no value in respect that it had been already forfeited, I think falls entirely to the ground. But, still further, it must be observed that even if there had been more apparent doubt respecting the continuance or endurance of this concession, that was a matter that was made fully known by the vendors to the vendees. It is obvious on the face of the deed and other writings, as well as from the parole evidence, that the whole parties who were concerned in this matter were perfectly aware of the real state of the facts. It is said that a fraud was committed upon the Company. I confess that I find it exceedingly difficult to understand that statement. When the first deed was made between the Messrs Lawson and Engelbach and Keir, who were getting up this Company, there was no Company to deceive, and after the Company was formed, the directors, who were the only parties that could have been deceived in the transaction,—for they were of course the parties who made the purchase and received the title from the Messrs Lawson,—were not deceived, because they also, as it appears, were fully aware of the precise state of the facts. Therefore, there appears to me, in the first place, to have been nothing to conceal, and, in the second place, that which was said to have been concealed was in point of fact not concealed but fully disclosed. But then it is said that a fraud was practiced by making it appear that the Messrs Lawson were the vendors in this transaction, and Mr Hartmont was kept out of sight, his name was not disclosed as having any interest in the concession. And the reason for doing that, it is said, was to impress people's minds with a sense of the good faith and straightforwardness of the transaction by showing that the sellers in the transaction were

so respectable a firm as the Messrs Lawson. The Messrs Lawson, so far as I can see, had no object in parading their names or in lending their names to any fraud. They had made their bargain with Mr Hartmont; they were bought off by the payment of £17,000, and really had no further interest in the matter. But I think it is not difficult to see why Messrs Lawson appear upon the face of the conveyance as the sellers of this concession. Although Mr Hartmont had been the original concessionary, the Messrs Lawson had in point of fact worked the whole concern during the year 1870, and were known to the San Domingo Government as the persons who were working the Alto Vela product: and the San Domingo Government would have been very loath, I should think, to recognise any one who had not obtained a title from Messrs Lawson. Therefore it was, I presume,—for I can see no other good reason for it,—that three deeds were executed at the time, instead of one deed directly, as has been suggested might have been done, by Mr Hartmont to the purchaser. Mr Hartmont,—or rather Hartmont and Begbie,—assigned in the first place to Messrs Lawson, to enable them to give a title to the Company, and I think without that circuity which has been described it would not have been very easy to have made a perfectly satisfactory and good title in the person of the Company or its directors. Therefore I cannot say I see any fraud in using the names of the Lawsons in this transaction.

It is further said that in the prospectus of the Company, which was issued upon 10th May, after the Company had been registered, there is a false statement introduced to the effect that the Messrs Lawson had expended £39,000 upon the Island of Alto Vela. "In connection with the Island of Alto Vela" is the expression; and it certainly turns out from the evidence of the trustee that they had expended at least £39,000 in connection with the Island of Alto Vela: so that there was in point of fact no mis-statement there at all, no false allegation or suggestion. It is not said in the prospectus that the value of that £39,000 would be found upon the island. That would be a very different statement indeed. The statement is made only for the purpose of showing that the Messrs Lawson had had so much confidence in the undertaking in which they were engaged that they had expended that large sum of money upon it. But even if there had been any exaggeration or misstatement in regard to the amount expended as stated in the prospectus, I do not see that the Messrs Lawson should be made answerable for that, or that they were parties to the preparing or issuing of this prospectus. But in truth the whole fraud really occurs after the time when this sale was made. The sale itself was the sale of a subject that had a real existence and was of value,—whether over estimated at £65,000 we have no occasion to consider. It is not said that £65,000 was too much for it if it was a real transaction; but that it was a really existing subject and a subject of value, and was sold for the price specified, is quite clear upon the face of these documents. And up to this point I confess I do not see any indication or symptom of fraud on the part of Messrs Lawson. It is very difficult to understand why a respectable firm of that kind should have lent themselves to a proposed fraud. I do not see what they were to gain by it; and I do not very much see, on the other hand, what Mr Hartmont, who is at the bottom of the fraud which was committed, had to gain by implicating the Lawsons in that fraud. And therefore, unless there were clear proof that the Messrs Lawson really were implicated in the fraud at the date when this sale was made, I do not think we could possibly sustain this claim, which depends entirely for its soundness upon the proof of fraud in connection with the contract. But no doubt after the sale was completed, and after the Company was brought into existence, the price was paid of £65,000; and instead of being paid in cash it was paid entirely in what are called "paid up shares" of the Company. This is made clear by the evidence of Mr Ogle. No doubt he says he received cash; but upon cross-examination it comes out quite clearly that by receiving cash he meant there were cross entries made in the book which were intended to represent cash, but what he actually got delivered to him were paid-up shares of the Company to the amount of £65,000, and these he divided among the parties concerned,—Mr Hartmont, and Messrs Engelbach & Keir, who were the promoters of the Company, and Messrs Lawson to the extent of the £5,000 worth of shares which they were to take as part of their payment from Mr Hartmont, but which, as I said before, was afterwards converted into a payment to them in cash. Again, I do not know that there is anything illegal in persons who sell a valuable commodity to a Company that has just been formed, taking payment for that commodity in paid-up shares of the Company,—even in that. The illegality and the fraud consisted, I think, entirely in the use which was made of those paid-up shares, and in the manner in which Mr Hartmont and his friends went about the sale of those shares. In the first place, it was by fraudulent representation that they got the shares of this Company into the market at all,—by imposing upon the authorities of the Stock Exchange and obtaining a settling-day and quotations. It is alleged very decidedly in the record here that the Messrs Lawson were participants in that fraud. Then the holders of those shares took means to raise their value in the market to an entirely fictitious amount by misrepresentation and by fictitious sale; and again, it is alleged on the record very strongly that Messrs Lawson, and particularly Mr Henry Graham Lawson, who is specified by name as being engaged in this transaction, were largely implicated in this fraudulent sale and had made large profits thereby Now there is not one single word of evidence from beginning to end to connect any of the Messrs Lawson either with the imposition practised upon the Stock Exchange or with the subsequent fraudulent transactions in the Stock Market. The evidence upon that point is an entire blank, and the Messrs Lawson themselves, who were examined declared that they never held a share for their own behoof, and never sold a share of the stock. In these circumstances, I confess I think the appellant has entirely failed to make out his case against Messrs Lawson. What case he may have against other parties, or in any other form, or in any other Court, it is not for me to say; but in order to success as a claimant in this sequestration upon the estates of Messrs Lawson it was indispensable that he should show that the £65,000 which he claimed was a debt owing by Messrs Lawson to him, because it was the price which they had been paid under a fraudulent contract of sale,—a contract of sale which he had been induced to enter into by the fraud of the Messrs Lawson.

But there are difficulties in the case, if it were

at all necessary to enter into them. I confess I do not very well see upon what ground it is the appellant company thinks that that £65,000 is to be paid in cash upon the annulling of this sale. That £65,000 in cash never was paid by the Company. What they actually delivered as the price of the concession of Alto Vela was 6500 shares of the Company—paid-up shares no doubt—but were these shares ever worth £65,000 at any time? Were they worth £65,000 at the time of the sale, or were they ever really of that value? That the shares were nominally of that value at one time in the market, and of much higher value, is no doubt true. But that was brought about by the fraud of parties with whom the Messrs Lawson have nothing to do—I mean by proceedings with which the Messrs Lawson have nothing to do—and therefore it would be a very great difficulty and obstacle in the way of this appellant, even if he had succeeded otherwise in the foundation of his case, to show how this debt—for it is claimed as a debt—of £65,000, can possibly be owing. Again, if the sale is to be annulled even on the ground of fraud, there must be, I apprehend, a *restitutio in integrum*, and if there is to be a *restitutio in integrum* on one side there must be equally so upon the other. Now, is this Company in a condition to retransfer the concession of Alto Vela to the Messrs Lawson or to anybody else representing the vendors in that transaction? They certainly are not, because it is abundantly clear that by their own proceedings and transactions with the San Domingo Goverment they have now finally lost this concession. But really these subordinate considerations I do not dwell upon, because I think the true ground of judgment here is that the appellant has entirely failed to bring home to the Messrs Lawson that fraud of which he complains, and which he says induced the Company to enter into this contract.

I think it is very much to be regretted that we have not had the advantages of a judgment of the Lord Ordinary upon this question. It is a case of very considerable importance, and although I confess I do not entertain any doubt about the conclusion to which I think we should arrive, it has required a very considerable amount of consideration. But the Lord Ordinary, unfortunately, has directed his attention entirely to a different matter, and has given us what is nothing more in substance than a repetition of the very elaborate and able argument which was addressed to us by Mr Kinnear on behalf of the appellant some time ago—I think in the month of March last.

Lord Deas—I so entirely concur in the observations of your Lordship that it is not necessary or me to add almost anything.

The leading ground of this claim is fraud upon the part of Messrs Lawson, and the character in which they are said to have committed that fraud is that of vendors of the concession of the Island of Alto Vela, the party or parties upon whom the fraud is said to have been committed being the purchasers — the company or shareholders,— and the fraud alleged consisted entirely of concealment, with the exception of certain misrepresentations said to have been made in the deed and in the prospectus. Now, in order that concealment may be a fraud by a seller upon a purchaser, it must be concealment of something from the purchaser, and if the purchaser knows everything that can be known, it is impossible that it can be concealment or fraud. There cannot be concealment from him if there is no concealment. Consequently, I don't see how, if the purchaser here, or those acting for and representing the purchaser, knew everything that the seller knew, there can possibly be that kind of fraud which alone is alleged here. That concealment, after all, seems to consist in a very small matter. It is concealment of the fact that they had not wrought or carried away from that Island 10,000 tons in a year, and concealment of the fact that the Government of San Domingo had manifested their discontentment with that. Now there is no concealment of the fact that they had not carried away 10,000 tons per annum; and as to the concealment of the effect of that on the Government, the Government had not at that time manifested any dissatisfaction whatever with that fact. On the contrary, as your Lordship has pointed out, the Messrs Lawson were allowed to go on working and carrying away the guano, and the Government were accepting the lordships from time to time, and up to the time when this sale was effected there was no appearance of dissatisfaction, far less an intimation that the Government had availed itself of the option to annul the concession. The Government up to that time did not want to avail themselves of it. It was not a condition,—it was not an irritancy in the deed, that if they did not carry away 10,000 tons per annum the concession was to be null. There was nothing of that kind. It was merely an option on the part of the Government that if that happened they might take advantage of it to annul the concession. But they had not only not availed themselves of the option, but it is clear as the sun that they did not want to avail themselves of it. A reasonably advantageous transaction had been entered into for them, and probably also for the parties taking the concession. It was better for the Government to get the substance sold and carried away, and paid for, than to let it lie there unproductive, as it had done for I do not know how many centuries, probably longer than we think the world existed. And therefore, even if they were getting less than a fair lordship, it was important for the Government that a transaction of this kind should go on; and it is quite plain that they were very well pleased with the parties who they then supposed held the concessions, viz., the Messrs Lawson. I daresay they knew just as much about the respectability of the position of the Messrs Lawson as we know here. They had an active agent apparently, who I think behaved throughout this matter with great temper and good sense; and in place of taking the first opportunity of exercising the option and getting rid of good tenants, he was anxious to keep them, and not desirous apparently to exchange them for a French company which offered to come forward. The transaction might no doubt have been a very good and a very profitable transaction for the original shareholders, who paid £10 per share. They might have been able to get a very good percentage on their money out of it, and so far as we can see they would have got a very good percentage out of it if they had had sufficient capital to carry it on. But what would have been a very good return to them would not have been so to gentlemen who paid £59 or £60 per share, and who might not have much capital left behind in order to carry on the affair. So far as we see, the only thing that prevented the Messrs Lawson

from carrying on this concession themselves, and making a large profit by it, was the want of such a large amount of capital as was found to be necessary to carry it on, and which led them to think they had better get out of it in the best way they could, in place of going on with a thing that they had not capital to manage. But if they or the Company had had a sufficient amount of capital to carry it on, there is no reason in the proof to hold that it would not have paid reasonably well. It was not originally a bubble. We see now-a-days speculations of various kinds; we hear of mines being represented as capable of yielding great wealth, when there is no mineral in them at all. That is not said to be the state of this Island, or of this concession. The thing was there, and it was a reasonable speculation for anybody with sufficient capital to go through with it. As regards the position of Messrs Lawson, it is very necessary to see how it was that they were brought into this matter at all. Hartmont and other two associates had got the concession before Messrs Lawson ever heard of it. They had got the concession in June 1868. Then Mr Hartmont seeks for and gets an introduction to Messrs Lawson, and according to his account of it he pays a large sum of money to get that introduction. He says in his evidence at p. 35, "Ogle and Begbie were interested with me in the Alto Vela concession from the beginning. (Q) Do you mean they had paid so much money to you?—(A) They had paid no money to me. (Q) Had they given you services?—(A) Yes. (Q) Then that was the value of their services?—(A) Yes. (Q) What were the services for which they got the £15,000 stock?—(A) Their services were from the beginning of 1868; they introduced me to Messrs Peter Lawson & Sons, and when I was in San Domingo they looked after my business in London. (Q) Anything more?—(A) No. (Q) What was the nature of the business that they attended to during your absence?—(A) Freighting ships." So that they got £15,000, according to this evidence, for two services—one apparently the freighting of ships when he was abroad, and the other to introduce him to Messrs Lawson. I don't say it is proved that he had any sinister object in that, but it certainly looks very odd, because the first thing he does is to represent the concession of the island of Alto Vela in these glowing colours to Mr Graham Lawson. It is not necessary to notice any of the other Messrs Lawson here except Mr Graham Lawson, because, if anybody was to blame, they are all less to blame than he. He conducted the whole matter, and if there was a fraud it would lie on him and on nobody else. Well, Mr Hartmont represents the island in glowing terms to Mr Graham Lawson, and gets him on the part of the Company to agree to take the concession off his hands, upon the footing and condition that they shall disburse all the money. He is not to pay a penny, nor to become liable for a penny. They are to take all the liability, and to make all the disbursements; and he is to have one-third of the profits in name of commission, stipulating at the same time expressly that there is to be no partnership. He is merely to get a commission, but a commission to the extent of a third of the whole profits, they taking the whole risk, making all the disbursements, and paying all the expenses. That is the position which Hartmont gets with reference to Messrs Lawson & Son. Whether or not he meant to defraud Messrs Lawson, it is plain that they were not meaning to defraud him, or looking to any unfair advantage at that time. Matters go on, and then Messrs Lawson find, not that they have got a bad bargain, so far as we can see, but that they had expended a large sum of money—£35,000 or £39,000; that they did expend a very large sum there can be no doubt, and it seems to have been all entered in their books from day to day in the most regular and accurate manner, and there is no dispute about the expenditure, except £2000 or £3000, less or more. They then found they had not the very large capital necessary to carry on with; and they wrote the letter to which your Lordship has referred. I don't say it is evidence, but it was written at that time to a gentleman who was acting for them, and there is no doubt they were truly representing the state of matters as then existing. In that letter they say they had been led to form an idea of getting a Company to take it off their hands, because, they said, "We cannot go on working Alto Vela without help, and to pay handsomely it ought to be worked well." That is exactly what the engineer wrote,—that by laying down railroads and increasing the plant, it might be made a very profitable and paying concern. That is the position in which they are when they want, very naturally, to get rid of this speculation which is too heavy for them. Then, undoubtedly, Hartmont takes advantage again of their necessities to get into his hands the formation of a company, seeing very likely what he could make of it if it were left to him. And he makes a bargain with the Messrs Lawson that although the value of the concession might be estimated fairly at £65,000, their share of it is only to be £17,000. Upon the footing of relieving them of all further risk in the matter, he says.—We will make the price £65,000, but my associates are to get the whole of that except £17,000. It is there, I think, that there comes in the main thing that could be laid to the charge of the Messrs Lawson. I mean, that although they may not have had any fraudulent intention themselves, the question arises, whether it was so negligent on their part to allow Mr Hartmont to lead them into the leading strings into which he had got them for his purposes,—whether they should not have seen through the thing to a certain extent, and seen that he was a man who might make a wrong use of matters, after he got them into the position into which he wanted to get them? There is a difficulty there, undoubtedly,—whether, in point of law, they were entitled to be so negligent, and just to do whatever was dictated to them by Hartmont,—and whether they ought not to have seen what might come out of it,—and whether there should not be a liability upon that ground? But that would be a very different liability—a liability upon negligence; and I don't think it was pressed on us in argument, that, in point of law, any negligence of that kind would lay the foundation of this claim. That is not the ground on which it is put. It is upon the ground of fraud, and the motive of the fraud is distinctly stated in the record. There is no fraud without a motive. You may not be able to discover the motive, but the fraud requires to be very clear in itself if you cannot discover any motive for it. But when the party charging the fraud tells you the motive, you are bound and entitled to take it that that was the motive; and if that motive is not proved, but disproved, then that surely goes very

deep into the question whether there can be said to be fraud at all. Now, it is distinctly alleged on record that the object of the Messrs Lawson in entering into this fraud was to make profit by it in the way that the other parties seem to have done. But there is no more remarkable part of this case to my mind,—no part that makes me more cautious to throw any doubt on the honesty of the Messrs Lawson than this—that while they had the opportunity, if they had chosen, not only to have made money by it, but to have made money by it to an amount that would have released them from all their difficulties, they did not sell one single share in the market at a premium, as these other parties did. It is perfectly plain that if they had chosen to stipulate that they should get paid-up shares, with the power to go into the market and sell them at a profit if they thought proper, they would have got them. There would have been no objection whatever to give them a large amount of shares, which they could have gone into the market and sold. If they had stipulated for that, and got it, there seems to be no bounds almost to the amount of money that they might have made. Mr Hartmont tells us himself that in one hour he sold 1000 shares at £56; so that he made £56,000 in a single hour. How many more transactions of that kind he had he does not tell us. How much money there is in his pocket I don't know. The misfortune is, that when money gets into one's pocket in that sort of way, it very often burns a hole in it, and it does not remain long there; but if he has kept that in his pocket he must be a very rich man; and if he could make £56,000 in that way in a single hour, is it not clear as the sun that the Messrs Lawson, if they had chosen to stipulate for it, might have gone into the market and sold the shares for £100,000 or £200,000 of profit, and relieved themselves from all their difficulties. But not having availed themselves of that power to the extent of a single share, and that being the motive falsely alleged against them, it seems to me a very startling thing to say that in the circumstances of this case we are to reduce the contract upon the ground of fraud.

I have only to add that I entirely agree with your Lordship in the remark that it is very much to be regretted that we have not had the judgment of the Lord Ordinary in this case. It went to him in a position in which he could have had no difficulty in giving a judgment. We had taken the responsibility of affirming the interlocutor of Lord Shand, which repelled both these pleas about sisting the case pending the result of the proceedings in Chancery. We had taken the responsibility of pronouncing that final judgment, and the Lord Ordinary would have taken no responsibility, whatever he thought of the law, if he had gone on, after taking the proof, to decide the case; and I think it would have been much better if he had done that, more particularly because I think your Lordship is quite correct in stating that all that is in that elaborate note of the Lord Ordinary's was pleaded to us at the bar very ably by Mr Kinnear. I have got notes of the argument, with the addition of all the authorities bearing on it, which I don't find in the Lord Ordinary's note. We fully considered all that, and we came to a conclusion upon it; and therefore no responsibility would have lain upon him if he had just gone on and decided the case in the ordinary way, in place of presenting this very unusual sort of Reclaiming Petition against the judgment which we had pronounced, and showing up, or attempting to show up, the grounds on which we had proceeded, turning the Outer House into the Inner House, and certainly not in the most judicial terms that could have been adopted.

Lord Ardmillan—I am of the same opinion on the merits of this case, which are now before us for disposal on the proof. The sequestration is here, and is proceeding, and in the sequestration this question has arisen. I feel bound to say that the getting up of this Company, the preliminary arrangements in regard to it, the preparation and the issuing of the prospectus and the terms of it, the prior agreement among some of the parties, the large sums paid for promotion money, and the ultimate sale to the Phosphate Company, were to a large extent the offspring of a fraudulent intention, and the execution of a fraud against the public. In regard to the conduct of some of the parties engaged and acting together in these proceedings, I fear there can be no doubt of its fraudulent character. But I entirely agree with your Lordship in thinking that actual personal fraud on the part of any of the Messrs Lawson has not been instructed. The claimants have failed to prove the averments of fraud against the Messrs Lawson, or any of them. The object and purpose of the fraud appears to have been to give to the scheme a false and deceptive attraction, to run up shares to a premium and sell them at a high price; and this object was probably obtained by several, certainly by Mr Hartmont, who says that his motive was "purely philanthropic," but who at the same time sold 1000 shares at £56 a share,—shares issued at £10 a share, and of which the last price obtained appears to have been £2,—and dear at the money!—and who admits that he had besides that dealt largely in the shares. But no shares were so held, or so disposed of by Messrs Lawson, or by any of them. If Mr Graham Lawson, who was the party immediately acting,—the discretion and judgment of whose conduct cannot be defended,—had really shared and carried out the fraudulent aims of those who got up the concern, he had ample opportunity, for then, as Lord Deas has well observed, he might have made a large fortune, for he could easily have obtained any number of shares, and could easily have sold them at a very high premium; but he did not sell one, either at a premium or otherwise. He did not do so or attempt to do so, and while I admit his indiscretion, I cannot perceive any fraud in his conduct. If there had been here an action by *bona fide* shareholders, who were deceived and defrauded by the parties to the transactions, that would have presented a very different question for decision, and then there would have been an action against the Company. It is most important that the public be protected against the fraud of parties acting in combination in the manner here explained, for the getting up of a company and the disposing of shares. But we have no such case here. Whatever fraud there was in this transaction was fraud on the part of the purchasers as well as on the part of the vendors; and the party who received the subject sold was just as fully in the knowledge of everything as the party who transferred the thing sold. There was no deception between the two. If both were fraudulent, the public was the common victim. But these claimants now before us do not represent the public: and those whom they

do represent were not deceived and not wronged, for they were themselves parties to whatever fraud was perpetrated on the public. My great difficulty is that these claimants, who are in the position of pursuers, have not explained, though asked repeatedly to explain, who were deceived or who were wronged. They talk about the fraud on the part of those who got up the concern, and of those who entered into this transaction, but whom did these parties deceive that is now here? No one. The only parties deceived were the unfortunate parties who bought at a high premium afterwards,—not the parties now before us. The Company and those who represent the company were not deceived. I think the public were undoubtedly deceived, and that the getting up and promotion of the Company as instructed by the evidence was a fraudulent device; but it was a fraud on the public. These claimants, however, do not represent the public, nor do they represent any one entitled to restitution.

On the other points in the case I have nothing to add to what your Lordships have stated, and I concur entirely in the result of your Lordships' judgment on the merits of the case.

The Court pronounced the following interlocutor:—

"The Lords, on the report of Lord Young, Ordinary, having heard counsel on the record and proof, and proceedings, remit to the Lord Ordinary in the Bill Chamber to refuse the appeal and confirm the deliverance of the trustee, and to find the appellants liable in expenses in the Bill Chamber in so far as not already found due; find the appellants liable in expenses since the date of the Lord Ordinary's interlocutor reporting the case; allow an account thereof to be given in, and remit the same, when lodged, to the Auditor to tax and to report to the Lord Ordinary in the Bill Chamber; with power to his Lordship to decern for the taxed amount of said expenses."

Counsel for Appellants—Watson and Pearson. Agents—Davidson & Syme, W.S.

Counsel for Respondents — Dean of Faculty (Clark), Q.C., Balfour, and Mackintosh. Agents—Stuart & Cheyne, W.S.

HOUSE OF LORDS.

Tuesday, June 23.

(Before Lord Chancellor Cairns, Lords Chelmsford, Hatherley, and Selborne.)

KIRKPATRICK *v.* KIRKPATRICK'S TRUSTEES.

(*Supra*, vol. x. p. 363.)

Property—Disposition.

Held (aff. judgment of the Court of Session) that a *mortis causa* conveyance of heritage executed by a person who died prior to the Titles to Land Consolidation Act 1868 (31 and 32 Vict. cap. 101) was invalid in respect that the word "dispone" was not used.

Succession—Revocation.

Held (rev. judgment of the Court of Session) that a revocable deed conveying the granter's whole estate, heritable and moveable, was not revoked by a subsequent deed by necessary implication, the new deed containing no express revocation, and owing to the omission of the word "dispone" being found ineffectual as a conveyance of heritage, while the former deed was effectual in all respects.

The late Mr and Mrs Kirkpatrick, having eight daughters and one son, executed on the 18th June 1866 a deed whereby they conveyed and "disponed" to themselves, as husband and wife, and their survivor, all their property, heritable and moveable. The deed contained provisions for the daughters, but was silent as to the son.

Nine months afterwards, on March 4, 1867, Mr and Mrs Kirkpatrick executed a second deed, "giving, granting, and assigning," but not *disponing*, to trustees the property in question. This second deed made no reference to the first, but inasmuch as its provisions departed from those of the first deed, showing an intention to displace the first and substitute the second. The Court of Session decided that the first deed was in effect revoked and inoperative, thereby neutralizing both deeds as regarded heritage (the second being inoperative as a conveyance of heritage) and opening the succession to the son as heir-at-law.

The trustees appealed.

In delivering judgment—

The Lord Chancellor said—The first question raised is whether the heritable property which the deed of 1867 proposed to convey has been validly conveyed, for if so, then the former deed of 1866 would be superseded, and the deed of 1867 would be the only one which regulates the succession of the maker of the deed. It appears that the deed of 1867 omitted to contain the word "dispone," which was a word of art and efficacy in the disposition of Scotch heritable property, and all the Judges held that the want of that word was fatal to the validity of the deed of 1867 as a conveyance of heritable property. The appellants have challenged that decision. It would indeed appear to be a very technical view to hold that the want of a single word should be fatal to the validity of a deed, however clear the intention might be; but it should be recollected that in the law of England, also, the absence or presence or a single word is often fatal or efficacious in like manner. I am therefore of opinion that the appellants have failed to show that the deed of 1867 was valid as a conveyance of heritable property. Then the second question arises, whether the deed of 1867, though invalid as a conveyance, is nevertheless valid as a revocation of the deed of 1866; and on this point five Judges in the Court below held that it is. If it were not for the respect one must always feel for a majority of the learned Judges in Scotland, I should have thought this to be a case admitting of little argument. The deed of 1867 professed to dispose of both the real and personal property. It had no recital as to whether the deed of 1866 was to be thereby revoked or not. The only thing clear was that if the deed of 1867 had been effectual, then that of 1866 must be revoked. There may be cases where a deed may be valid to revoke though ineffectual to convey. Some of the Judges below seemed to be satisfied that the use of the words "in order to regulate the succession to my means and estate," implied an intention to revoke the prior deed without anything more, but those words were in fact only