

Circumstances in which, in an action at an agent's instance against his client for judicial expenses incurred in a previous suit, a reclaiming note against a judgment decerning the latter to pay the amount of the account as taxed by the Auditor was refused, in respect that an order to lodge objections was not timeously obtempered.

This was a reclaiming note against a judgment of the Lord Ordinary (YOUNG) pronounced in these circumstances:—The pursuers, who had acted as agents for the defender in an action reported *ante*, vol. xiv, pp. 134, 570, and 590, raised an action for the amount of their account, viz., £716. The account was remitted to the Auditor for taxation, and when his report came before the Lord Ordinary the defender asked for time to lodge objections, as there had been a change of agency, and the defender's new agents were not yet in a position to lodge them. Five days were allowed, and on the case being again called, in respect that defender's counsel stated he had received no instructions to lodge objections, the Lord Ordinary approved of the account as taxed, and gave decree for the amount, viz., £701, 9s. 10d.

The defender, after allowing the full number of reclaiming days to elapse, reclaimed against this interlocutor. The pursuers' counsel, when the case appeared in the Single Bills, objected to its being sent to the roll on the ground that there was no matter that could be made the subject of a reclaiming note.

The Court called upon the counsel who appeared for the defender to explain the circumstances under which the interlocutor was pronounced. He stated he had not been counsel in the Outer House, and the Court thereupon directed the counsel who had appeared in the Outer House to be called. The latter then said that the facts were as narrated above. It was suggested that the defender should be allowed another day to lodge objections, and in the event of his failure to do so, that the reclaiming note should be refused.

At advising—

LORD PRESIDENT—I think this reclaiming note must be refused. The whole matter of objections to an Auditor's report is by Acts of Sederunt and the practice of this Court a very summary procedure; and in ordinary cases, as one of your Lordships has remarked, objections cannot be received more than forty-eight hours after the process has been returned from the Auditor. This party has had since 12th June to lodge objections and has not done so yet.

LORD DEAS—I think it should be made to appear that we have heard from counsel all that took place in the Outer House.

LORD MURE—The interlocutor reclaimed against bears that counsel for the defender was present at the bar, and he has stated to us that he had previously got delay from the Lord Ordinary, but was not instructed to lodge any objections. The rule, as Lord Shand observes, is that a party is allowed forty-eight hours to lodge objections. In spite of that, if parties had come here with their objections ready, I should have been for hearing them, but there are none here.

LORD SHAND—For my part, even if the party

had appeared with his objections ready, I should have been for refusing to admit them. To do so would be to overturn the whole practice of the Court in matters of this kind.

The reclaiming note was therefore refused.

Counsel for Pursuers (Respondents)—Low. Agents—Davidson & Syme, W.S.

Counsel for Defender (Reclaimer)—Mair—Rhind. Agent—W. Officer, S.S.C.

Friday, July 5.

## FIRST DIVISION.

[Bill Chamber, Lord Adam.

THE PHOSPHATE SEWAGE COMPANY  
 (LIMITED) v. MOLLESON (PETER LAW-  
 SON & SON'S TRUSTEE).

*Bankruptcy—Jurisdiction of a Foreign Court after Sequestration has been Awarded in Scotland.*

An English company lodged a claim in a Scotch sequestration which the trustee rejected, and his deliverance was confirmed after proof by the Court of Session and the House of Lords. Shortly after lodging their claim the claimants instituted a suit in the English Court of Chancery in order that the same question, which was one of alleged fraud on the part of the bankrupts, might be determined. The Vice-Chancellor and the Court of Appeal "ordered that the plaintiff company be at liberty to prove under the sequestrated estates." The plaintiff then lodged a new claim in the sequestration based on the Chancery decree. *Held*, irrespective of the plea of *res judicata*, which was founded on the earlier Scotch proceedings, that the Court of Chancery had no jurisdiction to pronounce such an order against the trustee in a Scotch sequestration, who was subject to the exclusive jurisdiction of the Courts in Scotland.

*Statement (per Lord President) of the principles of international law which regulate questions of bankruptcy.*

*Res judicata—Competent and Omitted—Case of a Claimant in a Sequestration making a Second Claim.*

Averments in two successive claims in a sequestration in consequence of which the plea of *res judicata* was sustained, the *medium concludendi* in the second being similar to that in the first, and the only distinction being that certain new allegations were made which tended to substantiate the fraud founded on.

*Question (per Lord President) whether a claimant in a sequestration is not rather in the position of a defender than in that of a pursuer of an ordinary action, and whether in consequence the principle of the rule of competent and omitted is not applicable to him, obliging him in any claim he makes to put forward all he has to maintain at once.*

This was the continuation of a litigation which had been going on for some years in the Courts both of Scotland and of England. It was pre-

viously reported—March 18, 1874, *ante*, vol. xi. 359, and 1 R. 840; July 18, 1874, *ante*, vol. xi. 707, and 3 R. (H. of L.) 79, *note*; June 20, 1876, *ante*, vol. xiv. 1, and 3 R. (H. of L.) 77; and in England—November 1875 and March 1876, Law Reports, 5 Chan. Div. 394.

The Phosphate Sewage Company (Limited) and Edmund Peach, the official liquidator thereof, claimed upon the sequestrated estates of Peter Lawson & Son, merchants in Edinburgh, and of the individual members of that firm (upon which James A. Molleson, C.A., the respondent, was trustee), for £65,000, which the claimants averred they had paid to Messrs Lawson as the price of a concession by the Government of San Domingo of the guano on the island of Alto Vela. The concession turned out to be worthless, and the claim was made for repayment of the price, which they alleged the Company had been induced to pay through the fraudulent actings of a combination of persons among whom were the four members of the firm of Peter Lawson & Son.

The first claim in the sequestration was lodged on 14th March 1873, but it was withdrawn on 24th June following, shortly before the period fixed by statute for the trustee adjudicating on the claims lodged, the claimants having on 19th April filed a bill in the English Court of Chancery for the same sum of £65,000 against certain parties, including the respondent Mr Molleson as trustee for Peter Lawson & Son. Thereafter, on 28th June, the claimants lodged a second claim identical in terms with their first, which the respondent rejected on 27th October following. The trustee's deliverance was appealed to the Bill Chamber, and a record was made up and closed on 6th January 1874.

After various procedure—reported *ante*, vol. xi. 359 and 707, and 1 R. 840, and 3 R. (H. of L.) 79, *note*—the Court of Session eventually, on July 18, 1874, refused to sist the case until the issue of the Chancery suit, and on the proof which had been led in the case held that no case of fraud sufficient to implicate the Lawsons had been disclosed. The Phosphate Company appealed, but the House of Lords on the 22d June 1876 dismissed the appeal, and adhered to the judgment of the Court of Session.

On 19th April 1873 the appellants, as has been stated, raised a Chancery suit in England by way of bill of complaint against Edward Herzberg Hartmont and Robert Spear Begbie, who carried on business as merchants under the style of Hartmont & Company, John Ogle, a promoter of the appellants' Company, Francis William Englebach, and George Lawrence Keir, accountants, &c., and the respondent as trustee for Peter Lawson & Son, for, among other things, a declarator that under the circumstances in the bill the sale of the concession of 8th May 1869, therein mentioned, to the plaintiff Company, was fraudulent and ought to be set aside; and that the combination of the defendants (other than Molleson), and of the several members of the firm of Peter Lawson & Son, for the purposes in the bill mentioned was fraudulent, and the Company ought to be relieved from the consequences thereof, and also that it was a breach of trust on the part of the defendants, the directors of the plaintiff Company to pay the sum of £65,000, or permit the same to be paid in the manner therein aforesaid out of the funds of the plaintiff

Company for the purchase of the concession, and that the defendants (other than Molleson and another), all of whom were engaged either as vendors or as promoters or directors or solicitors of the plaintiff Company, in the transactions, and the estate of Peter Lawson & Son, were jointly and severally liable to make good to the plaintiff Company the sum of £65,000, together with interest thereon, and for a decree against the defendants for the payment of the said sum and interest, and that the plaintiff Company might be at liberty to prove against the estate of Peter Lawson & Son for the same accordingly. Answers were lodged by all the defendants, and several new matters coming to light in the answers, the appellants found it necessary from time to time to amend their bill of complaint, which was thirdly and finally amended on 3d March 1874. Mr Molleson, the respondent, pleaded against the jurisdiction of the Court of Chancery, but his pleas being repelled he continued a defendant, and maintained defences on the merits.

The hearing of that cause lasted sixteen days in November and December 1875, and on 22d March 1876 a decree was pronounced by Vice-Chancellor Malins, sitting in the Chancery Division of the High Court of Justice, whereby it was declared that the sale of the concession to the plaintiff Company was fraudulent, and it was ordered to be set aside, and it was also, *inter alia*, ordered "that the plaintiff Company" (the appellants) "be at liberty to prove against the estates of the said Robert Spear Begbie under the liquidation proceedings instituted by him, and also under the sequestrated estates of Peter Lawson & Son as a company, and Charles Lawson, Charles Lawson junior, Henry Graham Lawson, and George Stodart Lawson, the only partners in the said company, as such and as individuals, in the pleadings named for the said sum of £65,000, and interest thereon at the rate of four pounds per cent. per annum from 31st May 1871 up to the dates of the said liquidation and sequestration respectively, and for the costs of this suit." Against that decree the respondent appealed, but the Vice-Chancellor's decree was affirmed in the High Court of Justice, and the appeal dismissed with costs on 13th April 1877. That was notwithstanding the contention by the respondent Molleson that the suit had been decided in his favour by the decision of the House of Lords on 20th June 1876.

The Phosphate Company, founding on that decree, then lodged a third claim in the sequestration. This claim, which formed the immediate subject of the present action, was rejected by the trustee on 25th July 1877, on the ground that it was identical with the former claim which had been finally rejected by the House of Lords. The claimants, the Phosphate Sewage Company, appealed, and a record was made up.

The following averments had been made by the appellants in the former record:—By an agreement dated 8th May 1869 the Dominican Government had granted to Messrs Hartmont & Company a concession for the term of fifty years of the guano or phosphate of lime in the island of Alto Vela. This agreement provided, *inter alia*, art. 3—"Messrs Hartmont & Company bind themselves to export annually a quantity of at least 10,000 tons of guano, granito, or phosphate of lime;" and art. 7—"in case the

grantees shall not export the minimum quantity stipulated in art. 3, the Dominican Government shall have the right to declare the present concession null, and to dispose of it as they shall see fit." Arrangements had been made between Hartmont & Company and Peter Lawson & Son for the working and disposal of the concession, whereby the Lawsons had become entitled to a certain share in the profits, and had the actual management of the concern from 1st January 1870. It had turned out that there was no guano on Alto Vela, and consequently the condition as to a minimum export could not be literally fulfilled. There was, however, another substance called phosphate of alumina, but of this—even assuming that it fell within the concession—nothing like the specified quantity had ever been exported. Phosphate of alumina was worthless as a substitute for guano, but it was believed that when combined with sewage, in accordance with certain patents, it might be profitably used as a manure, and it had been agreed to form a company—the Phosphate Sewage Company—with this object, "(Cond. 2) The three firms of Hartmont & Company, Peter Lawson & Son, and Englebach & Keir, and the said several members thereof individually (together with a Mr John Ogle), were the promoters of the appellants' company, and were respectively actively engaged in the transactions hereinafter mentioned, and respectively made large profits thereby." "(Cond 8) In the early part of the year 1871 the said Edward Herzberg Hartmont and Robert Spear Begbie" (Hartmont's partner), "the several members of the said firm of Peter Lawson & Son, and the said John Ogle, well knowing (as the fact was) that through their default the said concession had become and was then voidable, and liable to forfeiture, determined to form a joint-stock company for the purpose (amongst other things) that the company should purchase the said concession from them at the price of £65,000. For this purpose they entered into communication with the said Francis Englebach and George Laurence Keir, and a provisional committee was formed, consisting of the said Robert Spear Begbie, Francis William Englebach, George Laurence Keir, and a Mr William Lewis Grant, for the purpose of carrying the said scheme and design into effect. Various other persons have associated with them in carrying out the said scheme and design."

With a view to the formation of the company, and the sale to it of the concession by the Dominican Government, Hartmont and Begbie had sold by indenture, dated 20th April 1871, their entire interest in the concession to the Lawsons. Thereafter, by articles of agreement, dated 28th April 1871, made between and executed by the Lawsons (therein called the vendors) on the one part, and Englebach and Keir (therein called the purchasers), for and on behalf of a company thus intended to be forthwith incorporated, to be called the Phosphate Sewage Company, Limited, of the other part, it had been agreed, *inter alia*, that when the company was formed the vendors should sell and the Company should purchase all the extra right, title, and interest belonging to the vendors in the island of Alto Vela for the sum of £65,000. The sale had been completed by indenture, dated 28th May 1871. "(Cond. 12) Previously to the execution of the said indenture of the 20th April 1871, and the said agree-

ment of the 28th April 1871, each of the several members of the firm of Peter Lawson & Son well knew (as the facts were) that it was least doubtful whether the said concession gave any right to the concessionaires to work phosphate of alumina, and also that in consequence of the minimum quantity of 10,000 tons not having been exported in the year 1870, the said concession was at that time voidable and liable to be forfeited. Nevertheless the said several members of the firm of Peter Lawson & Son combined and colluded together with the parties to the said deeds and others to conceal these facts from the persons who might become shareholders in the appellants' company other than themselves, and to form the appellants' Company for the purchase of the said concession, and to invite the public to subscribe for shares in the appellants' Company, on the untrue representation that the said concession was a valid concession, and comprised the liberty to work phosphate of alumina, and that the same was in nowise void or voidable or of doubtful title, and in a suppression of the material facts of the case. In fact, the object and scheme of the said persons was to obtain the control of a large number of shares in the appellants' Company, representing the said purchase money of £65,000, and afterwards to obtain a settling-day and quotation for the shares of the appellants' company on the Stock Exchange, and by speculating and trafficking in such shares to make large profits for themselves. The appellants' Company was not formed *bona fide* for the purpose of working the said concession and patents, but for the purpose of enabling the promoters and directors to make profits by transactions on the Stock Exchange, which they in point of fact did to a large extent."

On the 5th October 1872 the Dominican Government had intimated that on 28th April 1871, the date of the transfer of the concession to the Company, the vendors' right therein had already ceased to exist, owing to the fact that during the year 1870 only 1981·45 tons of guano had been exported, and after some further negotiations the Government had declared the concession absolutely forfeited.

The history of the origin of the Company underwent a longer investigation in the English Courts, and the appellants now made the following averments in their present condescendence:—" (Cond. 11) At this time the said E. H. Hartmont and R. S. Begbie, the several members of the firm of Peter Lawson & Son, and the said John Ogle, were well aware that through their default the concession of Alto Vela had become and then was voidable and liable to forfeiture, and was of little or no value; but they nevertheless determined to form a joint-stock company for the purpose (among other things) that the said Company should purchase the concession from them, with a view of dividing the purchase-money among themselves and those who assisted them in the scheme, and of making large profits by dealing in the shares of the Company on the Stock Exchange.

. . . . . In pursuance of this scheme it was resolved that Peter Lawson & Son, who were then in good repute as a large and old-established mercantile firm, should appear to the public as the vendors of the concession, although they had sold all their interest to Hartmont, and that the said Messrs Englebach and Keir, with whom communications had been established, should be bribed

by a sum of £15,000 to assist in carrying the scheme into effect by representing the purchasers, viz., the Company which was to be formed, and who are now the appellants. (Cond. 14) It was arranged between the said promoters that the nominal price or purchase-money to be paid by the Company should be £65,000, of which £50,000 should be paid to Hartmont & Company, Lawson & Son, and the said John Ogle, in shares agreed on between themselves, and that £15,000 should be paid to the said Englebach & Keir in the event of the scheme succeeding. The said £15,000 was thus given as a bribe to Englebach & Keir to induce them to overlook objections to the title of the concession that was being sold, and to accept it as trustees for and on behalf of the proposed Company." Cond. 15 related to the title which the Company got, and with regard to which counsel who were consulted had made several important requisitions. One of these was in regard to the forfeiture stipulated for by the Dominican Government in the event specified above. Englebach & Keir finally, "in collusion with the other promoters and at the urgent representations of Ogle and Forsyth, acting under the direction of Lawson & Son, positively instructed Mr Ramsden (the agent) to waive the requisitions, and to proceed to settle the agreement for purchase without delay, which was done. . . . (Cond. 16) The said £15,000 was subsequently paid or authorised to be paid by Peter Lawson & Son to Englebach & Keir (trustees for the Company), or at all events they were well aware that the said sum was to be paid to them with the view above mentioned, and they were parties to the whole transactions set forth above, the consequence of which was that by means of fraud, to which Peter Lawson & Son and the individual members of the firm were parties, the appellants' Company were induced to pay £65,000 for a concession which was worthless, and which all the members of the said firm of Peter Lawson & Son well knew to be worthless, or at any rate of far less value than the price paid for it."

The respondent averred "that the only matter pleaded upon in the Chancery suit (as appearing from the finally amended bill filed by the appellants therein), and not specially pleaded upon in the closed record in the former appeal, was the alleged payment of a sum of £15,000 by the promoters of the Company to Messrs Englebach & Keir, which payment, and the particulars connected therewith, were known to the appellants long prior to the closing of the record in said former appeal, and prior to the lodging of the original condescendence in said appeal, having been set forth in the answer filed for John Ogle in said Chancery suit on 22d November 1873. Explained, that the said alleged payment was the subject of proof and discussion in the said former appeal," and generally "that the whole matters here alleged were within the record in the former appeal, and were the subject of proof and discussion in the said appeal."

The appellants pleaded, *inter alia*—" (1) In respect of the decree of the Chancery Division of the High Court of Justice, mentioned in the affidavit, the appellants are entitled to be ranked on the sequestered estates of Peter Lawson & Son, and of the individual members of the firm, in terms of the claim. (4) The judgments of the Court of Session and the House of Lords affirm-

ing the respondent's former deliverance, do not decide the question raised by the present appeal, and it is therefore not *res judicata*. (6) The bankrupts Peter Lawson & Son, and the individual members thereof, having, as set forth on record, fraudulently conspired with the other parties there mentioned to induce the appellants, by means of fraud, to pay £65,000 for a valueless subject, they are, along with the other said parties, jointly and severally liable to the appellants in reparation to the amount claimed."

The respondent pleaded, *inter alia*—" (1) *Res judicata*. The present claim is based on the same medium as the claim adjudicated on under the former appeal. (2) The whole material averments of the appellants having been made in the former appeal, or having been competent to be made therein and omitted, the appellants are not entitled to a re-trial of the case. (3) The decree of the High Court of Justice founded on is ineffectual to determine the validity of the appellants' claim in the sequestration.

The Lord Ordinary on the Bills (ADAM) sustained the first plea-in-law for the respondent and dismissed the appeal. His Lordship added this note.

"Note. . . . — The two claims, in so far as regards the principal sum [*The interest asked in the first claim was five, in the second four per cent*] are identical. It would therefore appear that there is a conflict between the judgments of the High Court of Justice and of the House of Lords—the one sustaining and the other rejecting the claim of the appellants. The Lord Ordinary is of opinion that he cannot give effect to the judgment of the High Court of Justice in the same way as if the earlier judgment of the House of Lords had not been pronounced. He thinks that the House of Lords' judgment must be taken as final and conclusive against the claim of the appellants as regards all matters which were within the record in the case in the Court of Session, and were adjudicated on in that case.

"It was maintained, however, by the appellants, that the judgment of the High Court of Justice was entitled to receive effect, because it proceeded (1) upon the consideration of matters which were *noviter veniens ad notitiam*, and were not founded on in the case in the Court of Session; and (2) because the present claim was founded on a new and different *medium concludendi*, which was not founded on, and was not adjudicated upon in the former claim.

"The appellants did not maintain that the claimant in a sequestration was in a different position from the pursuer in an ordinary action as regards a plea of *res judicata*. It was, however, maintained by the respondent that a claimant in a sequestration was not in so favourable a position as the pursuer of an ordinary action, who, it was admitted, might insist in a second action on a different *medium concludendi* from that on which the first was founded, but that a claimant was bound to set forth the whole grounds of his claim at once, and that having had an opportunity of stating and proving his claim, and having failed, he was not entitled to insist in his claim a second time, although it might be insisted in upon different grounds.

"It appears to the Lord Ordinary that there is a good deal to be said in support of this view,

provided the grounds on which the second claim is founded were within the knowledge of the claimant, and might have been brought by him before the Court in support of the first claim; in the view, however, which the Lord Ordinary takes of this case it is unnecessary for him to decide the point.

“The question in the present case comes to this—Whether, supposing there had been no proceedings at all in England, a second claim would have been competent in Scotland in respect of the matters now founded on? If such a claim be competent, and can be entertained, then the judgment of the High Court of Justice may or may not be examinable, or may or may not be conclusive, but it does not appear to the Lord Ordinary that the fact that the High Court of Justice has adjudicated on the matter affects the question of the competency of the claim.

“The matters which are alleged not to have been stated or pleaded upon by the appellants in their condescendence and pleas in their former appeal are set forth in the sixth article of the present condescendence. The only new matter not specially pleaded upon in the closed record in the former appeal is the alleged agreement to pay £15,000 as a bribe to Englebach and Keir, in order to induce them to accept the title to the concession of the guano and other phosphates on the Island of Alto Vela, and the circumstances under which the requisitions, made under the advice of counsel, were waived, and the title accepted, and the several deeds and agreements prepared and executed, by which the concession was foisted on the Company.

“It is denied by the respondent that these matters were not known to the appellants long prior to the closing of the record in the former appeal, they having been set forth in the answer filed for John Ogle in the Chancery suit on 22d November 1873. This answer has not been produced to the Lord Ordinary, and he cannot say how the fact stands.

“It does not, however, appear to be material whether that was so or not, because it is clear from the appellants' own averment that the facts in question were known to them long before the proof was led or any judgment pronounced in the case in the Court of Session. The proof in that case was led on the 16th of June 1874, while it is stated by the appellants that the facts in question came to their knowledge in the months of January and April of that year. If it be that these matters only came to their knowledge subsequent to the closing of the record in the Court of Session there would have been no difficulty in having the record opened up and the new matter added thereto. The appellants did not however take that course. They preferred taking the judgment of the Court on an imperfect case, and they have themselves to blame for the result.

“It is further said that it was not until the discovery of documents obtained in the English suit, and the oral examination of parties and witnesses at the hearing, . . . that evidence was obtained to connect the firm of Peter Lawson & Son, and the individual members thereof, with the fraudulent scheme charged against them and with the additional acts of fraud and misrepresentation in connection with the concession and the Company now founded on. But it has

not been shown to the Lord Ordinary that the documents might not have been recovered and the parties examined equally well in the Scotch suit. It may be that if the facts now founded on had been founded on and proved in the former appeal the result of that appeal might have been different. But failure to found on or to prove the whole facts constituting the fraud within the appellants' knowledge will not entitle them to try the case a second time.

“A pursuer, however, by the law of Scotland, is not bound to include all his ground of action in one libel; and if the appellants can make out that the present claim is founded on *new media concludendi* they will be entitled to insist in it. It is stated by Erskine, book 4, 33, that ‘no defender is entitled to the plea of *res judicata*, or that the cause has been already finally determined, unless the decree founded on in proof of that allegation have been given forth in a process litigated between the same parties, or their ancestors or authors, respecting the same subject, and proceeding upon the same *media concludendi* that are contained in the subsequent action brought against him by the pursuer.’

“The question therefore is, Whether the present claim is founded on a different *medium concludendi* from the former claim? The ground of action in both claims is that set forth in the sixth plea-in-law for the appellants, viz., That the bankrupts Peter Lawson & Son, and the individual members thereof, fraudulently conspired with certain other parties, including Englebach and Keir, to induce the appellants, by means of fraud, to pay £65,000 for a valueless subject. The alleged new facts are just additional facts tending to substantiate the fraud founded on. If the appellants were to be now allowed to prove these facts in addition to what they previously proved, it may be that they would succeed in showing that Messrs Peter Lawson & Son fraudulently conspired to induce the appellants to pay £65,000 for a worthless subject. But this is just the issue which they submitted to the Court and failed to prove in the former appeal.

“The Lord Ordinary is therefore of opinion that the present case is not founded on any new or different *medium concludendi* from that founded on in the previous case.

“It is said by the Lords Justices (*Phosphate Sewage Company v. Hartmont*, 5 L.R. Chancery, p. 456) that the case presented to the House of Lords was ‘substantially different from the case which, by means of the discovery and evidence in the English suit the plaintiff Company has been enabled to allege and prove against the Lawsons. Nothing in our present judgment conflicts with anything said or decided in that House, except, perhaps, as to the one statement relating to the expenditure of the £39,000, as to which, on the fullest consideration and reconsideration, we retain our opinion that it was calculated and intended to deceive, and was substantially therefore a false representation. And, in fact, the plaintiffs were enabled to place that part of the case, like the other part of it, in a very different way from that which they were able to do in the Scotch proceedings.’

“The Lord Ordinary has not had to consider the evidence adduced in either case, but he does not doubt that the case was presented in a very different way to the Lords Justices from what it

was in the Scotch proceedings. But the case which was presented was the same case. It is the fault of the appellants themselves if it was not presented in the same light in the Scotch Courts as it was subsequently in the High Court of Justice. The facts were known to the appellants, and, as has been already stated, there was no reason why the discoveries or evidence subsequently obtained in the English suit might not have been equally well obtained in the Scotch suit. But it is not the law of Scotland that a party is entitled to try a cause a second time which he has previously tried and failed to establish, because he is, or alleges himself to be, able to adduce new or additional facts in support of it. As stated by the Lord Chancellor, a full opportunity was afforded to the parties in the Scotch suit to constitute their claim if they were able. If they did not allege in their condescence in their first appeal as much as they alleged in their bill in Chancery in England, it is their act, and one for which no one but themselves is answerable—3 R. (H. of L.) 80, June 22, 1876.

“On these grounds the Lord Ordinary has sustained the respondent’s plea of *res judicata*.”

The appellants reclaimed, and argued—(a) As to the effect of the proceedings in Chancery, the first question was, Had the Court of Chancery jurisdiction to pronounce this decree supposing that there had been no previous trial of the question in Scotland? The whole transaction complained of was substantially an English transaction between parties who were all more or less English, for the Lawsons had an office in London. The Court of Chancery therefore had undoubted jurisdiction to determine whether a fraud had been committed, and further to declare that the Lawsons were parties to the fraud. Before bankruptcy the decree of a foreign court was unquestionably effectual to the constitution of a debt in this country, subject no doubt to a general right of examination by the Scotch Courts; and if after sequestration a foreign court had not the same jurisdiction in strict law and form, still such a decree might be received here as evidence of the bankrupt’s liability in cases like the present, in which the question was much more conveniently tried abroad. Secondly, The previous proceedings in this Court and in the House of Lords made no difference. Although the report did not expressly show that the English Courts compared the Scotch record and their own bill, yet it was plain that the plea of *res judicata* was before them, and that they rejected it—see Lord Justice James’ observations, Law Reports, 5 Ch. Div. 449. Therefore, as they must be held to have decided the point rightly, their decree could not be set aside on that ground; it was not as if they had decided in ignorance of the proceedings here.

But (b) throwing the Chancery suit out of account, was the question *res judicata* by reason of the previous proceedings in Scotland? In the first place, the appellants were claimants in a sequestration, and were therefore in the position of pursuers, not of defenders. The plea of “competent and omitted” did not apply to them, and it was of no moment what their knowledge of the circumstances was at the date of the proof. The only question was whether the present *medium concludendi* was the same as in the former action. The fraud now alleged as the *medium concludendi* was that Engelbach and Keir, the re-

presentatives of the company, received a bribe of £15,000 to overlook the objections to the vendors’ title to the concession. Now, it might be that this allegation was in terms within the former record; but the plain meaning and intention of both parties there was to put a fraud of a different sort in issue, viz., the obtaining by means of Stock Exchange devices high prices for the shares of a company which the sellers knew to be in an insecure position. This was made clear from the 12th article of the former condescence (*supra*).

Authorities—Stair, iv, 1, 44, and 40, 16; *Gillespie v. Russell*, June 25, 1857, 19 D. 897, and July 1859, 3 Macq. 757; *Strathmore*, May 24, 1833, 11. S. 644; *Macdonald*, May 26, 1840, 2 D. 889—(H. L.) Aug. 11, 1842, 1 Bell’s App. 819; *Wilkie v. Cathcart*, Nov. 19, 1870, 9 Macph. 168.

Argued for the respondent—(1) The question was plainly *res judicata*. If the two records were compared, it would be found that the same question was substantially raised in both, the present record being fuller merely in the details of the fraudulent scheme by which the company was to be brought into existence. Everything that was proved in the Chancery suit was relevant under the first record; and, in point of fact, both the payment of £15,000 and the waiving of the requisitions were in evidence before the Scotch Courts. (2) Even were the *medium concludendi* new, the appellants must show that they were in ignorance of it at the time of the former proof. They were not like ordinary pursuers; they could not choose their own time; and must put forward all the grounds of claim within their knowledge at once, on the principle of “competent and omitted,” otherwise a sequestration might be prolonged indefinitely. In point of fact, the answers for the various defendants in the Chancery suit made it plain that the appellants knew all that they now alleged, at all events before the proof in the former case, if not before the record was made up. (3) The Chancery case began after the *concursum creditorum* established by the sequestration, which moreover was recognised by the appellants who lodged a claim and led a proof thereon. The English Courts consequently had no jurisdiction.

Authorities—*Southgate v. Montgomerie*, 15 S. 507; *Stewart*, Feb. 20, 1838, 16 S. 632; *Roy*, 16 D. 51; *Goetze v. Aders, Preyer & Co.*, Nov. 24, 1874, 2 R. 150; *Huntington Copper Company v. Henderson*, Jan. 12, 1877, 4 R. (H. L.) 294, 15 Scot. Law Rep. 217.

At advising—

LORD PRESIDENT—The present claim is the third which the appellants have lodged in the sequestration of the estates of Peter Lawson & Sons, and of the individual partners of that Company. The first claim was lodged on 14th March 1873, within about a month after sequestration had been awarded, and it was withdrawn on 24th June following. The second was lodged four days after the withdrawing of the first. It was rejected by the trustee, and an appeal having been presented, the appellants were allowed a full opportunity of proving their claim; and the proof having been completed, the Court on considering the evidence affirmed the deliverance of the trustee, rejecting the claim on the 18th of July 1874. The judgment of the Court was affirmed by the House of Lords on

appeal on 22d June 1876. Each of these claims is for a ranking for the same sum of £65,000, being the amount which the appellants allege they paid under a contract of sale into which they were induced to enter by the fraud of the bankrupts and of certain other parties acting in concert for the purpose of defrauding them. In the interval between the rejection of the second claim and the presentation of the third the appellants have obtained a decree of the Court of Chancery (pronounced by Vice-Chancellor Malins on 22d March 1876, affirmed on appeal by the High Court of Justice on 13th April 1877), by which the Court of Chancery, *inter alia*, declared that the sum of £65,000 (being the same sum which has been three times claimed in this sequestration), ought to be refunded to the appellants, and further declared that certain defendants in the Chancery suit, including "the estates in sequestration of the defendants Peter Lawson & Sons as a company, and Charles Lawson," &c., "the only partners of the said company, are jointly and severally" (along with other defendants in the said suit) "liable to make good to the plaintiff company," (the appellants in this Court), "the said sum of £65,000 so paid for the purchase of the said concession," with interests and costs. The decree of the Court of Chancery further ordered "that the plaintiff company be at liberty to prove under the sequestered estates of Peter Lawson & Sons, as a company, and Charles Lawson," &c., (the partners) "for the said sum of £65,000, with interest thereon at the rate of 4 per cent. per annum from 31st May 1871 up to the date of the said sequestration, and for the costs of this suit."

The suit in Chancery in which this decree was pronounced was instituted on 19th April 1873, two months after the estates of Messrs Lawson were sequestered, and more than one month after the whole estates of these bankrupts were vested in the respondent Mr Molleson as trustee for the creditors in the sequestration. Mr Molleson, the trustee, was made a defendant in that suit.

This third claim of the appellants is met by the plea of *res judicata*, and the Lord Ordinary has sustained that plea. But the appellants by their first and second pleas demand that effect shall be given to the Chancery decree, and that they shall be ranked for £65,000, without inquiry, and irrespective of the question, whether, had there been no such decree, the former judgment of this Court, affirmed by the House of Lords, would be pleadable as *res judicata*. This demand appears to me to be opposed to certain well-settled principles of international law.

First, The great principle, that moveables follow the law of the owner's domicile, is not more firmly settled in the case of intestate succession than it is in the case of bankruptcy. Hence, whenever the court of the domicile has by proceedings in bankruptcy vested the moveable estate of the bankrupt in a trustee or assignees for the purpose of equal distribution among his creditors, no part of the moveable estate wheresoever situated can be touched or affected except through the bankruptcy proceedings and by the orders of the court of that country in which these proceedings take place. The jurisdiction of that court is exclusive. This proposition is fully supported by the cases of *Strother v. Reid*, 1803,

*M. Forum Competens*, Appendix, No. 4; *Mailand v. Hoffmann*, 1808, *M. Bankrupt*, Appendix, No. 26; and *Goetze v. Aders, Preyer, & Company*, 2 *Bettie* 150.

Secondly, When the bankrupt is a trading company having two trading domiciles, as in the present case, the same principle is still applicable. The process of distribution of the effects may be instituted in either domicile, but where it has been instituted in one of the domiciles, and the estate has been vested in a trustee or assignees, no claim can be made effectual against the estate, and no part of the estate can be touched or affected except through those bankruptcy proceedings, and the jurisdiction of the Bankruptcy Court of that domicile is exclusive even of the courts of the other domicile—See *The Royal Bank of Scotland v. Scott, Smith, Stein, & Co.*, Jan. 20, 1813, *Fac. Coll.*; and the judgment of Lord Eldon in the case of *Selkrig v. Davies*, 2 *Dow* 230, approving the judgment of this Court in the former case.

Thirdly, These principles of international law do not apply to the real estate of the bankrupt situated beyond the country of the domicile. But in questions between different parts of Her Majesty's dominions the Imperial Parliament has wisely provided that a bankruptcy, or rather the completion of the trustee's or assignee's title to the bankrupt estate, shall have the effect of transferring to and vesting in him all real estate in any part of her Majesty's dominions—See 19 and 20 *Vict. c. 79* (*Bankruptcy (Scotland) Act 1856*), sec. 102.

Fourthly, The trustee in a Scotch sequestration may be subject to the jurisdiction of an English Court, or the assignees in an English bankruptcy may be subject to that of a Scotch Court, personally. But I am of opinion that in their character of trustee and assignees respectively they can be subject to the jurisdiction of no court except the courts of the country within which the bankruptcy proceedings have been instituted, and the *concursum creditorum* has been established. The bankrupt too may be subject to the jurisdiction of courts beyond the country of his domicile and of the bankruptcy proceedings, and he may be sued in such court. If the object of the creditor suing be merely to constitute his debt, there will be no objection to the jurisdiction, for the constitution of the debt is sometimes a useful and even necessary proceeding for the purpose of preserving or securing recourse against co-obligants or cautioners, especially when the principal debtor is bankrupt. An instructive example of this is to be found in the case of *Roy v. Campbell*, 12 *D.* 1028. But when the same creditor afterwards raised an action in this Court to have it declared that he was entitled to be ranked on the bankrupt estate of his debtor, which was being administered in England, and called as defenders in that action the English assignees, he was met with the defence that "no suit or action for payment of a dividend can be maintained in any court of law or equity by any creditor of the bankrupt against the assignees under the bankruptcy;" and "further the estates of the bankrupt are vested in the assignees for distribution among such of the creditors as shall come and prove their debts under the bankruptcy, and for them only." The assignees on these grounds objected to the jurisdiction of the Court and the competency of the action. Lord Curriehill

(Ordinary) was of opinion "that the action ought to be dismissed in respect that it is not this Court but the Court of Bankruptcy in England which is the proper *forum* for trying the questions raised in this action." Lord Fullerton denounced the action as "outrageous and startling," and all the Judges concurred in dismissing the action as incompetent—*Roy v. Kirkland & Pennell*, 16 D. 51.

Giving their legitimate effect to these well-settled principles and rules, I am of opinion, with all possible respect for the learned Judge who pronounced this decree, and for the other learned Judges who affirmed it on appeal, that in the trial of the question whether the appellants have established a claim to be ranked on the sequestrated estate of Messrs Lawson, the courts of this country have exclusive jurisdiction, and the courts of England have none; and therefore that we can give no effect to the decree of the Court of Chancery in the present case.

There remains for consideration the question whether the appellants are entitled to a proof of the averments contained in their present condescendence, or whether their claims are not effectually met by the plea of *res judicata* stated by the respondent. The appellants contend that in discussing this plea they must be taken to be in the same situation as if their two claims—the former, which was rejected, and the present—were each an ordinary action of damages brought by them as pursuers.

Assuming for the present that they are in the position of the pursuers of two actions each for the recovery of the same sum, and each directed against the same defender, the question of course is, whether the new claim is founded on a *medium concludendi* different from that on which the former claim was founded. If one challenges the validity of a deed on the ground of forgery, and fails, he may thereafter bring a fresh challenge on the ground that the granter's signature was obtained by the fraudulent representations of the defender; or if a creditor pursues his deceased debtor's son on the ground that he in his father's lifetime became cautioner for the debt, and fails, he may afterwards sue the son for the same debt on the ground that he represents his deceased father *titulo lucrativo*, and so is liable for all his debts. The plea of *res judicata* will not be a good answer to the second action in such cases, because the *medium concludendi* in the second action is clearly different from that in the first. Neither would it be a good objection to the second action that when the first was raised the pursuer was aware of both the two separate grounds on which he might challenge the deed or make the son liable for his father's debt. On the other hand, it is equally clear that if the deed be challenged on the ground that it was obtained by the fraud of the defender, and the pursuer fails because he does not aver and prove the whole facts and circumstances necessary to enable the court or jury to draw the inference of fraud, he cannot thereafter raise a new action again alleging that the deed was obtained through the fraud of the defender, but bringing forward a more complete statement of facts and circumstances from which the fraud is to be inferred. To that second action the plea of *res judicata* would be an insuperable objection, because the *medium concludendi* in both actions is the same.

To which, then, of these two categories is this case to be referred?

It appears to me that the *medium concludendi* on which both claims rest is the same, viz., that the bankrupts Peter Lawson & Sons, and the partners of that company, in concert with some other persons, induced the appellants by means of false and fraudulent representations to pay £65,000 for a subject which was practically valueless. The most favourable way of stating the case for the appellants is that in the condescendence in the former claim they alleged that the Lawsons had fraudulently foisted off this worthless subject on Engelbach and Keir, as representing the purchasing company, not yet in existence, whereas in this condescendence they say in addition that the Lawsons bribed Engelbach and Keir to join in fraud against the nascent company. But when the case is so stated, it does not at all suggest a new *medium concludendi*, for the ground of the claim both in fact and law remains the same, viz., that the Lawsons, in concert with other persons, induced the appellants by means of false and fraudulent representations to pay £65,000 for a worthless subject.

For these reasons, I am of opinion that, even if the appellants are to be considered in the same position as if they had been pursuers of two actions, the plea of *res judicata* must be sustained.

But it is by no means clear that the position of the claimant in a sequestration is the same as that of the pursuer of an action. When a bankrupt estate is sequestrated the whole creditors are summoned to come in and make their claims within a limited time under pain of being excluded from any share of the estate if they fail to do so. They are not in the position of a pursuer who may choose his own time to bring his action, and who, if he has more than one distinct and separate ground of action, may try first one and then another. The claimant in a sequestration, I apprehend, is more like a defender, who must put forward all he has to maintain at once. I do not say that the rule of "competent and omitted" is as strictly applicable to him as it is to a defender in an ordinary action, but he is certainly not entitled to have a rehearsal, as it were, of the trial of his claim—to harrass and obstruct the administration of the sequestrated estate and delay proceedings by advancing his claim first on one ground and then on another, both grounds being quite within his knowledge, and available to him from the beginning. I think it would not be consistent with the nature of our practice in bankruptcy and with the statutory rules on the subject to admit of such a repetition of the same claim.

That the appellants were possessed of all the necessary information and materials for the present condescendence when their former claim was tried cannot admit of doubt. We have it proved by the proceedings in the Court of Chancery that their bill was three times amended, and the bill as so amended contained everything that is set out in the present condescendence. The third amendment of the bill was made on 3d March 1874, but the trial of their former claim in this Court did not take place till the 16th of June thereafter, and the judgment of this Court was pronounced on 18th July. No doubt the record in the previous claim was closed on 6th January 1874. There is some evidence in the Chancery proceedings that the appellants had full information before this



date, but even assuming that they were not then in the full knowledge of all that they have now alleged—if in the month of March 1874, when it is not disputed that their information was complete, they had moved for leave to amend the record in order to introduce new matter—leave would at once have been granted. It is clear, therefore, that if in the previous trial of their claim they went on with what they now represent to have been, and what they then knew to be, an imperfect and incomplete case as regards the facts and circumstances from which the alleged fraud was to be inferred, they can hardly complain if they now suffer from their own *crassa negligentia*.

I have therefore no hesitation in affirming the Lord Ordinary's judgment.

**LORD DEAS**—It cannot be doubted, after the judgment of the House of Lords affirming the judgment of this Court in the former case, that the question whether there was a fraud to which the Lawsons were parties, and in respect of which a ranking was claimed on their sequestered estate, was competently raised and competently decided in that case.

This being so, it seems to me that, in no view which can be taken, can there be room for any question here unless the present claim and proceedings are based on a new and different *medium concludendi*. If they are not based on a new *medium concludendi*, the judgment of the House of Lords, affirming the judgment of this Court in the former case, is beyond all question *res judicata*.

I am of opinion with your Lordship that the present claim and proceedings are not based on a new and different *medium concludendi*, and if so, that ground alone is sufficient to sustain the judgment of the Lord Ordinary reclaimed against and the relative deliverance of the trustee.

It was distinctly set forth in articles 2, 8, 11, 12, and other articles of the condensation in the former case that Engelbach & Keir were parties to the fraud there alleged; that there had been a combination—a conspiracy—between the parties representing the vendors, on the one hand, and Engelbach & Keir and others who pretended to represent the company or its shareholders as purchasers, on the other hand, to saddle the shareholders with a purchase known to all these conspiring parties to be worthless. Well, then, in the present case there is substantially nothing new upon that head except an allegation that Engelbach & Keir received a bribe, under the name of commission on the purchase price. I cannot see how that makes the fraud a different fraud. It may be additional evidence that there was such a fraud, but it certainly does not amount to a new *medium concludendi*. But if the allegation that these parties received a bribe for their assistance in the fraud does not constitute a new *medium concludendi*, I am not able to discover in what the new *medium concludendi* is alleged to have consisted.

I do not say that the fact (which appears to be plain enough) that the claimants in the former case had access to know, or even that they did know, all that they now know of the materials whereby they might have supported their claim, would necessarily and of itself prevent the present claim from being competent if it proceeded on an entirely new and different *medium concludendi*. The claimants' previous knowledge and

means of knowledge are very important illustrations and corroborations of the fact that there really is no new *medium concludendi*. But it is conceivable that a party might have two distinct grounds of action, and that he might have legitimate reasons for first trying the one, and leaving it open to him, in case he failed in that one, to resort to the other. *Res noviter* is therefore not essential to a new *medium concludendi*, and the only point on which I at all hesitate in agreeing with the Lord Ordinary in his very clearly-expressed note is that he apparently puts more upon the previous knowledge of the claimants than I should be disposed to put on it. With that qualification I concur in all the views expressed in that note.

Additional evidence will not make a new *medium concludendi*, although it may be required to support it. So far as regards mere additional evidence, all pursuers are equally open with all defenders to the objection of competent and omitted. All the additional evidence now relied on by the claimants was competent in the former case, and it was their own fault if they did not adduce it. There would be no end to strife if this principle were not adhered to. The general doctrine and the reason for it are well stated by Lord Stair, i. 4, 49.

Even if there were here a new *medium concludendi*, a question of difficulty (as I suggested in the course of the discussion) would remain—Can claimants in a sequestration plead the same exception to the general rule of competent and omitted with pursuers of an action? There are strong reasons why they should not be allowed to do so. Sequestration is a summary process intended for immediate and final distribution of the estate of the bankrupt, and although it happens in the present case that the fund is still in the hands of the trustee, that is accidental, and expediency seems against recognising specialties whereby the winding-up of such a process might be indefinitely postponed. Resting, however, as I do upon the ground that the *medium concludendi* here is the same as before, that ground, if well founded, necessarily makes the present claim incompetent, supposing the claimants to be in an equally favourable position with that of the pursuers of a new action.

As regards the international law of bankruptcy, I agree very much in the general views stated by your Lordship, so far as necessary to be here gone into. I see no reason to change the opinion I expressed in the important case of *Goetze v. Aders Preyer, & Company*, Nov. 27, 1874, (2 R. 150), where the law required to be, and was, very carefully considered. In that case we had the aid of a very elaborate opinion by Professor Doctor Endermann, Counsellor to the Supreme Court of Appeal at Jena, in Saxony, in which he discussed, at great length and with great ability, the opinions of all the leading jurists on the subject. The report of the case in our books unfortunately does not develop the import of that opinion with respect to the general law, but the result arrived at in it was confirmatory of the views which, from a comparatively early period, have been taken of the subject in Scotland. I can have no doubt that the sequestration of the Messrs Lawson carried all their personal means and estate wherever situated to the general body of creditors, and the trustee as their

representative, rendering incompetent any similar attachment elsewhere (had such been resorted to), whether under the name of declaration, assignment, commission of bankruptcy, or what else. These estates, after the sequestration, could be reached only by a claim presented to the trustee, on the validity of which he was entitled in the first instance to give his deliverance, subject to an appeal to this Court, under which appeal the field of investigation might be enlarged to whatever extent justice seemed to require. But, except by a claim in the sequestration, no creditor, foreign or domestic, could obtain a share of the sequestrated estate, and in judging of that claim no effect could be demanded to be given to the judgment or decree of the tribunal of any other country beyond the deference due thereto *ex comitate*, which might therefore be either total or partial or of no effect at all, according as the trustee and this Court might think to be due to such judgment or decree after an examination into its grounds and warrants.

If I am right in these views, it follows that some of the declarations and orders in the decree now laid before us of the High Court of Justice (Chancery Division) are such as that Court had no jurisdiction to pronounce with respect to a Scotch sequestration, and to which consequently we can give no effect. For instance, the decree declares "that the defendant Edward Herzberg Hartmont and the estates in liquidation and sequestration respectively of the defendants Robert Spears Begbie and of Peter Lawson & Son as a company," and the individual partners of that company, "are jointly and severally liable to make good to the plaintiff company the said sum of £65,000 so paid for the purchase of the said concession, together with interest thereon at the rate of £4 per cent. per annum from the 31st May 1871 and the costs of this suit." "And it is ordered that the plaintiff company be at liberty to prove against the estates of the said Robert Spear Begbie under the liquidation proceedings instituted by him, and also under the sequestrated estates of Peter Lawson & Son as a company," and its partners, "for the said sum of £65,000 and interest thereon at the rate of £4 per cent. per annum from 31st May 1871 up to the dates of the said liquidation and sequestration respectively, and for the costs of suit."

It is obvious that if these declarations and orders were to receive effect in their terms, as regards a ranking on the sequestrated estate of Messrs Lawson, it would not be open to this Court to consider whether the plea of *res judicata*, as applicable to the claim now made, was well founded or not. I do not think we can entertain that view of the matter. If we are wrong in thinking the plea of *res judicata* well founded on its merits, our judgment on that point will be open to review in the House of Lords as the Scotch Court of last resort. But I am humbly of opinion that we cannot be excluded from considering and deciding that question on its merits by the decree of the High Court of Justice or any decree of another country, however much entitled to our deference and respect. I am therefore, on the whole, of opinion that the present reclaiming note should be refused.

LORD MURE—I concur in the result at which your Lordship and Lord Deas have arrived; and

on the grounds which your Lordship has stated, I think it is quite plain that the plea contended for on the part of the company that in respect of the judgment of the Court of Chancery, and in respect of that judgment alone, they are entitled to prevail, is one that cannot stand. This is the decree of a foreign court, and I have always understood that it was a perfectly settled rule that the decree of a foreign court which is sought to be enforced here cannot be given effect to necessarily in respect of its being the decree of a foreign court, but that we must examine to see whether it is a decree which the courts of this country should give effect to—See *Erskine*, iv. \*3, 4. This question was very anxiously and deliberately considered in the well-known case of *Southgate v. Montgomerie*, 15 S. 507, where the Court were unanimously of opinion that the decree of a foreign court was examinable with a view to see whether it was one that they could give effect to or not. That being so, I think the judgment of the Court of Chancery, upon which the present claim is made by the appellants, must be looked at, and when that is done it appears to me, upon the face of it, to proceed substantially on the ground of fraud. The concession of 8th May 1869 is set aside because of the fraudulent proceedings connected with it, and therefore fraud in the sale of that concession is the ground on which the Court of Chancery proceeds.

But then it is argued on the part of the respondent here that that was the ground of judgment in the case of the Phosphate Sewage Company in this Court in 1874, which was afterwards affirmed by the House of Lords, where the sale of this concession was challenged upon the ground of fraud just as distinctly as it is challenged upon the ground of fraud in these new proceedings. It is charged that there was fraudulent concealment of the fact that the concession was void because of a certain stipulated quantity of guano not having been put out in the year, and that the concession had come to an end by forfeiture in consequence of the failure of the sellers to do what they were required to do. Now, as I read the averments in this record, that is the ground on which this case proceeds, and what is now alleged is not a new *medium concludendi*. The action is based on the same general grounds, and the pleas-in-law show this very distinctly. The sixth plea-in-law for the appellants in this case, and the reasons of appeal, and the fourth and fifth pleas-in-law in the former case, set forth substantially the same ground.

It is not therefore a new ground of action which is here stated, but simply the alleged discovery of a fact which the Company say was unknown to them at the date of the former proceedings. That involves an examination of the record in these proceedings with a view to see whether there is in reality any foundation for this claim. I was not in this Division when the former case was before it, and therefore I have nothing more than a general knowledge of that case, but having examined the records carefully I have come to the same conclusion with the Lord Ordinary, that with one exception, viz., as to the £15,000 paid to Engelbach and Keir, there is nothing to be found in the record in the present case which was not substantially set forth in the record in the former action in this Court. The question of the £39,000

expended by the Messrs Lawson was dealt with in the former action. The alleged concealment of the forfeiture of the concession was dealt with in the former action. The alleged trafficking in shares was dealt with in the former action. The fact of the Lawsons appearing as vendors, while it was alleged that they had before that time parted with the material, if not the whole, interest, was distinctly set out in the former proceedings; and the opinions of your Lordships in that case dealt with those different questions under the proof that was allowed. There was no restriction put upon the parties as regards the proof, for whatever may be the case as regards specific allegations on record in that action, the matter of Engelbach and the £15,000 was without objection on the part of the respondent gone fully into in the proof that was led in that case, and was clearly brought out.

Now, that being so, it is alleged in the sixth article of this condescendence that the appellants discovered this new fact only after the record was closed in the former case. But when we come to look at the Chancery proceedings I find that this is not a correct statement. In the answer for Ogle, one of the defenders, which was lodged in Chancery on 23d November 1873, just about the time when the record was appointed to be made up in this Court in the former action, there is a distinct statement to the effect that that £15,000 was made over to Engelbach, so that six weeks before the record was closed in this Court the fact of £15,000 of the purchase-money being given to Engelbach was made known to the Phosphate Sewage Company. The appellants ask to be allowed to get a finding and judgment pronounced on the ground that they have made this discovery, and that they knew nothing about it before. But on the face of the Chancery pleadings it is quite plain that they knew. Still further, it is equally clear from the allegations in article 6 that long before the proof was gone into in this Court they were quite aware of all these things, because they themselves say it was not until 27th April 1874 that they were made aware of these important facts which they now found upon. Therefore they knew at all events in April 1874, and nothing is more clear, as your Lordship has shown, than that if an important fact of that kind comes to the knowledge of the parties, there are means by which they can get that fact put on record in order to be proved—a thing which is very frequently done, and now much more frequently than it used to be. But they do not do that. They go to proof without taking the steps which they ought to have taken. These facts were all stated in the re-amended bill on 3d March 1874. Every fact which is now stated on record in this case was stated in the Court of Chancery in March 1874, three months before proof was allowed in this Court. If the judgment pronounced here and in the House of Lords were opened up, it would be totally at variance with adjudicated cases and with the rules that have been applied in this Court for a long period of years.

I have looked into the authorities on this point, and I find the doctrine is that material facts of this sort, which are within the knowledge of the party or might easily have been ascertained

by him, cannot be brought forward as a ground of reduction of judgment if the party might with reasonable diligence have ascertained those facts. The first case was that of *Dundas*, 1810, Faculty Collection, where it was held that if the circumstances are such as might have been discovered before with proper inquiry, they are not to be held to be a ground for opening up a decree. That judgment was followed in the case of the *Magistrates of Dumbarton v. Campbell*, 1813, 5 Dow 206. It was also the same rule that was laid down in *Graham v. Graham*, 1 S. 35, and affirmed 1 Wilson and Shaw 353, and in various other cases. It is also brought out in the opinion of Lord Corehouse in *Stewart v. Stewart*, 16 S. 632, where his Lordship explains the difference between a *medium concludendi* and a mere new fact which has been discovered.

Assuming, then, that what is stated here on the part of the appellants is a competent ground for opening up the decree, viz., the allegation of the discovery of a new fact, I think it is plain upon the authorities I have referred to that if that fact was, or ought to have been, within the knowledge of the appellants at the time the case in this Court was decided, and they did not then choose to make use of it, they are not now entitled to come and ask to have the case retried. Yet that is exactly what it is proposed to do. They are themselves answerable for the omission, and it would be contrary to all the rules of procedure and to the long series of adjudicated cases if we were to reconsider the question.

LORD SHAND—The reclaimers in this case in their argument against the judgment of the Lord Ordinary have, in the first place, maintained, in terms of their first and second pleas-in-law, that in respect of the decree obtained in the Court of Chancery in England they are entitled without further investigation or procedure to be ranked upon the sequestrated estate of Messrs Lawson & Son, and it is therefore necessary before considering the plea of *res judicata* to deal with that contention. In the general case, as has been explained by Lord Mure, a decree of a foreign court—and I include a decree of the Courts in England—is examinable in this Court. The leading authority on that subject is the case of *Southgate v. Montgomerie*, to which Lord Mure has referred, in which it was held that a foreign decree is not of the same authority as a decree of the Courts of this country, and can only be considered as affording *prima facie* evidence of the truth and justice of the claims of the person in whose favour it has been granted. A considerable change has been made upon the law with reference to a certain class of decrees by the Judgments Extension Act (31 and 32 Vict. c. 54), but that Act of Parliament is limited to decrees granted by the Common Law Courts in England and Ireland only. It has no application to any order or decree of the Court of Chancery in England. The provisions of the statute are that, on the one hand, a decree by the Supreme Common Law Courts of England and Ireland shall receive effect summarily in this country in the same way as a decree of this Court, and, on the other hand, that a decree of this Court shall, on being registered in the Court of Common Pleas in England and Ireland, have the same force and effect as a judgment by those Courts respectively. Even therefore if

this were a case in which the bankruptcy of the respondents did not occur, this decree would not be accepted as final, as contended for by the appellants.

But the case assumes a special aspect when we consider we are here dealing with bankruptcy proceedings—with the administration of the estates of persons who have been declared bankrupts in this country. With reference to that circumstance I entirely agree with the view which your Lordship in the chair has expressed, that the Courts of England have no jurisdiction over the estate of a bankrupt administered under the Bankrupt Statutes in this country, and that the Courts of this country have exclusive jurisdiction. It appears to me, without going at length into the grounds of that opinion, that the views which your Lordship has stated are fixed upon well-settled principles of international law which have had the repeated consideration of the Court in the authorities which your Lordship has cited, and I think the opinion which your Lordship has now given will be accepted as a valuable and authoritative exposition of the law in future cases. Apart, however, from the principles of international law, I should further say that I think the provisions of the Bankruptcy (Scotland) Act 1856 (Statute 19 and 20 Vict. cap. 56) would operate the same result. I do not mean to go over the provisions of that statute, because I had occasion already fully to consider their effect at the first stage of this case. I refer to the opinion which I then expressed (1 R. 841) for the view which I still entertain. It is in very exceptional circumstances indeed that an action at law can be properly or competently raised and insisted in against a trustee on a bankrupt estate for the purpose of affecting the funds which he is administering. I would have the utmost difficulty in holding that a foreign court or an English Court should have the power of granting a decree which, having regard to the provisions of the statute, even the Courts of this country cannot in many cases effectually give otherwise than in the manner which the statute provides, viz., that the creditor shall initiate the judicial proceedings by lodging his claim with the trustee, who shall give his judgment upon it, subject to an appeal to the Courts which are to review what he does in the matter.

But the appellants have lodged a second, or, as your Lordship has pointed out, a third claim in the sequestration. We have to deal with that claim, and the question is whether the Lord Ordinary is right in holding that it is excluded by force of the plea of *res judicata* in respect of the former claim and of the judicial proceedings upon it. I think both claims may be accepted as being in the same position as an action or suit in which the claimants or appellants as pursuers demand payment of certain large dividends from the bankrupt estate. The trustee in a quasi-judicial capacity has dealt with those claims, but at the same time having resolved that the claims are not well founded, he represents the estate as a defender in declining to acknowledge them, and in supporting his deliverance in the interest of the general body of creditors in the legal proceedings which follow. Now, a plea of *res judicata* has always been held to be effectual if three things concur—if the parties be the same, the claim the same, and the ground of claim or *medium concludendi* the same.

In this question the parties are the same. The claim is the same, for in both cases the claim is for a principal sum of £65,000, being the payment which the appellant company made when they purchased the concession of the island of Alto Vela. The only difference if one compares the two claims is this, that in the one five per cent. interest was claimed, while in the other, apparently in respect of the terms of the decree of the Court of Chancery, the claim is made for four per cent. only. The parties being the same, and the claim the same, the only question that remains is whether there is a different ground of claim or action—a different *medium concludendi*—and I am clearly of opinion with the Lord Ordinary that the ground of claim is the same as that which was formerly insisted on.

It is worthy of observation at the outset that the first claim was founded on the very same bill in Chancery in which the decree by Vice-Chancellor Malins now founded on was granted. The claim is in these terms—“That the said sums” (enumerating the sums which are claimed) “are due and owing by the bankrupts to the said Phosphate Sewage Company (Limited) under the circumstances set forth at length in the bill of complaint in Chancery, filed on 19th April 1873,” and as concluded for under the first item of that bill of complaint. It is a decree granted in terms of and in respect of the prayer of that bill which is now sought to be enforced, although the first claim was rested upon that same bill.

But when the grounds of both claims are examined as these have been fully stated in the condescence in the respective litigations which resulted from the trustee's deliverance, it appears, I think quite clearly, that the ground of action in both claims is the same. The foundation of the claim for the appellants in the first instance was a fraudulent scheme on the part of the Messrs Lawson and others, who are named, to sell for £65,000, a property which they knew to be worthless, because the right of the sellers was liable to forfeiture and the action was rested on averments of alleged false and fraudulent concealment and representations on the part of the Messrs Lawson as giving rise to the purchase. I have carefully considered the particular averments which were made in the former record, and again in this record, and had intended to analyse these with some care, but should this case go further that will probably be better done by counsel at the bar. I shall only say that I think the statements forming the ground of action which are to be found in conds. 2, 8, and 12 of the former case are practically the same as we find in the present case, amounting, as I have said, to a case of fraudulent representation and concealment in pursuance of a fraudulent scheme to which the Lawsons and other persons were parties. And, as regards the pleas which profess to state, and do state the grounds of action, I think the 4th and 5th pleas which were maintained in the former case find their precise counterpart in the 6th and 7th pleas maintained in the present case; so that it is impossible to distinguish them. That the present case is practically the same as the former cannot be better shown than by reading a single passage from article 21 of the present condescence, in which it appears to me the appellants sum up all they have to state as their ground of action. They there state—“The said

Peter Lawson & Son were parties to all the false and fraudulent statements or fraudulent concealments above set forth, and are responsible therefor. They thus joined in an attempt to foist upon the appellants, the company, a property of no value, or at least of much less value than the nominal purchase-money, with a worthless or precarious title, or one which no conveyancer would accept." It appears to me that this passage is merely a restatement of the same general case of fraud that was alleged in the last case. What, then, is said to constitute the new ground of action here? Merely this, I think, as appears from the remaining part of condensation 21, that Engelbach & Keir, whose connection with the Lawsons was disclosed in the last action, and was the subject of proof in the last action, received a share of the purchase-money to the extent of £15,000. But while that is introduced as an incident in pursuance of the scheme, which after all is the ground of this action, and which as I have said was clearly the ground of the former action, it is the Lawsons' fraud that is the ground of action, as it was the Lawsons' alleged fraud that was the ground of action in the former case. It is merely one of the incidents in the case—an additional incident now mentioned—that in pursuance of their fraudulent purpose a portion of this money was handed to Engelbach & Keir. I have the greatest possible doubt whether that incident can be regarded as a ground of action at all. The ground of action in the former case being the Lawsons' fraud, the answer was, though the Lawsons did conceal certain facts or make certain representations, yet Engelbach & Keir, who were acting for the new company, were told everything. They were made fully aware of the precise state of the facts, and they were acting for the company. That was one of the defences maintained on behalf of the Messrs Lawson. Taking it so, was it not rather matter of replication than matter of substantive statement that the present appellants should reply:—It is quite true that Engelbach & Keir were informed of everything, but that was of no avail because you had given them an interest which had shut their eyes and induced them to sacrifice the interest of the company. I cannot doubt—I do not doubt—that if that replication been made merely in the answers to the statements of the trustee in the former record, it would have been properly so stated and would have enabled the Court to deal with the whole matter; and if that be so, I think it goes a long way to show that this is not so much a new ground of action as a mere replication to the defence of no fraud. It cannot, in my opinion, be regarded as a substantive ground of action.

But apart from this view, there remains what I think is obvious and clear, viz., that after all the true ground of action is the fraudulent representation on the part of the Messrs Lawson, and that it is just an additional element in the fraud, and not a different fraud, that in the carrying out the scheme or conspiracy to which it is alleged they were parties, they not only made false representations but gave Engelbach & Keir a share of the purchase-money, or as it is called a bribe, in order to induce them to shut their eyes to the weakness of the title. And so it appears to me that this is plainly a case of *res judicata*. To hold otherwise I cannot help thinking would

be a very serious matter for future cases which might occur in this Court. If the present appellants were allowed to proceed with this case as if it were substantially a new one, and should fail after proof to satisfy the Court that they were entitled to decree, I suppose we might have another action with some alleged new discovery of fraud. Suppose the appellants were able to say they had now discovered that the Lawsons had received notice from some officials of the Peruvian Government that the concession was to be forfeited, and had bribed them to delay the forfeiture so as to allow of this sale being carried out in the meantime, we might have all the present averments made over again with that addition, and it might be maintained—Here is an entirely new action, for we have an entirely new element of fraud introduced. In a case of this kind the only safe rule is that where a party has libelled a general case of fraud he shall not be entitled to try his case on a part of it, and come back time after time asking the Court to re-try the case with the benefit of the additional facts that in the meantime he has by greater diligence discovered.

Those views I hold and should give effect to apart from the circumstance that the appellants were in the full knowledge of all that they now allege when they went to trial in the former case. But it is impossible to lay out of view that under the very beneficial provision—most beneficial as it has been found in its working—of sec. 29 of the Court of Session Act (31 and 32 Vict.), by which the most extensive power of amendment is allowed on records in this Court, even up to the time of the trial of the case, the appellants had the power of putting everything upon the record which they now desire to have made the subject of this trial. I observe that the re-amended English bill was lodged on 3d March 1874, containing all the information which the appellants now say was new to them. The proof in the former case in this Court was not ordered until the 19th of May—two months afterwards. The order for proof was discharged upon 2d June, it was renewed upon 4th June, and was not taken until 16th June. The appellants not only possessed the information, but had actually put it upon the files of the Court of Chancery in England on 3d March 1874, and yet they did not propose to amend their record here although several months elapsed before the case went to proof. That such an amendment would have been allowed, as it was allowed in Chancery, there can be no doubt. As they deliberately refrained from making that amendment, I must say that it appears to me the only object they could have had in view was to have a rehearsal of the case—to try the case upon part of it—in the hope, it may be, that they might afterwards come back with a stronger case after they had tried their case in England. I do not think that is a legitimate course of procedure on the part of a litigant. It plainly shows that any possible hardship on the appellants is entirely out of the case. I would further say that in the case of proceedings in a sequestration—in which the object of the Legislature upon the face of the statutes is plainly to enforce summary procedure and rapid distribution of the estate under a system thoroughly fitted to secure those objects—it would be *pessimi exempli* that a claimant should be

held entitled to renew the same claim, as the appellants now do, after an exhaustive trial and litigation had already taken place, and so hang up the proceedings in the sequestration. In the present case the effect of the appellant's proceedings has been that the trustee—I think quite properly as matter of precaution—has been obliged to lock up a very considerable sum of money awaiting the decision of this claim, money which ought to have been divided amongst the creditors a considerable time ago.

I have only further to observe that it appears to me that if the proceedings and the judgment in this Court had been fully laid before the Court of Chancery, and pleaded as *res judicata*, or, as I think the plea in England is, judgment recovered, I cannot help thinking that that plea would have been sustained, and at all events I am satisfied it ought to have been sustained. The proceedings in this Court, as appears from the report, received some notice in the Court of Chancery; but certainly the learned judges there were not speaking with full knowledge either of the claim and record that had been made up in this Court or of the evidence that had been led in support of that claim. That this is so I think is obvious from the appellants' statement at the end of art. 1 of the concordance, in which they say—"Although the said suit did not come on for hearing till 15th November 1875, the respondent did not raise by his pleadings (as he might have done by amendment) any defence founded on his deliverance of the 27th October 1873 hereinafter mentioned, nor on the affirmation thereof by the Court of Session on the 18th July 1874." It may be that the respondent was well advised in taking that course. There was perhaps a good deal to say for the view that if the trial was to occupy 16 days before the Vice-Chancellor, and a great many different parties were engaged in it—many different defendants and many counsel—it could scarcely be expected that this question would have been taken up with that detail which was necessary, by an examination of the record and proceedings, to do justice to it. But however that may be, the fact remains that the point was not taken up and discussed there, and the trustee is quite entitled to raise the question now. I say it was not taken up with all confidence, not only because of the appellant's statement just quoted, but because neither the judgment of the Vice-Chancellor nor the judgment of the Lords Justices deals with this question of *res judicata* or judgment recovered. It is true that in a passage in the judgment of the Appellate Court, given by Lord Justice James—a passage which is noticed by the Lord Ordinary, he says—"We feel ourselves pressed by the decision of the House of Lords in the appeal from Scotland, but all the learned Lords who advised the House on that occasion most carefully confined their judgments to the case presented on the Scotch pleadings. The case so presented is substantially different from the case which by means of the discovery and evidence in the English suit the plaintiff company has been able to allege and prove against the Lawsons. Nothing in our present judgment conflicts with anything said or decided in that house, except perhaps as to the one statement relating to the expenditure of the £39000, as to which, on the fullest consideration and reconsideration, we retain our opinion that it was

calculated and intended to deceive, and was substantially, therefore, a false representation. And in fact the plaintiffs were enabled to place that part of the case like the other parts of it in a very different way from that which they were able to do in the Scotch proceedings." I read that passage as quite distinctly dealing, not with any plea of *res judicata*,—a plea excluding the jurisdiction of the Court to consider the merits of this question—but rather as dealing with the general nature of the evidence in each case. It was evidently maintained in argument for the defendants in the English suit that the case proved was substantially the same as that which had been held insufficient by the Court of last resort, and the Lords Justices felt that in dealing with the evidence they had a case which in some respects had a close resemblance to the case which the House of Lords had before them. It was in comparing evidence with evidence, and not dealing with a plea of *res judicata*, that the observations above quoted were made, and it may be that the House of Lords would have taken the same view of the evidence adduced in the Court of Chancery. That evidence cannot, however, in my opinion, in any way affect the present judgment.

On the whole, I am of opinion that the judgment of the Lord Ordinary ought to be adhered to.

The Court adhered.

Counsel for Claimants (Appellants)—Kiuncar—Jameson. Agents—Davidson & Syme, W.S.

Counsel for Respondent—Balfour—Mackintosh. Agents—Stuart & Cheyne, W.S.

Friday, July 5.

## FIRST DIVISION.

M'PHAIL v. HAMILTON.

*Shipping Law—Merchant Shipping Act 1854 (17 and 18 Vict. c. 104), sec. 65—Petition under that Section for Interdict against a Co-partner dealing with Ship in way of Sale, Mortgage, &c.—Competency.*

*Held (diss. Lord Shand)* that a petition presented under the 65th section of the Merchant Shipping Act 1854 by one of two parties in a joint-adventure, to interdict the other from dealing with a ship, in which both were interested, by way of sale, mortgage, or otherwise, was incompetent, on the ground that (following *Roy v. Hamilton & Co.*, 5 Macph. 573) that section was not applicable to such a case, but only to cases where a ship or share of a ship had become vested in a person not qualified to own a British ship.

This was a petition under the 65th section of the Merchant Shipping Act 1854, at the instance of Hugh M'Phail, steamship owner, Glasgow, praying the Court to restrain his partner in a joint-adventure from dealing "by way of sale, mortgage, or otherwise" with a certain ship in which they had a joint-interest. The 65th section of the Act was as follows:—"It shall be lawful in England or Ireland for the Court of Chancery, in