

of every Judge to put it to a prisoner whether he desires to say anything on his own behalf. In the present case the offence charged and admitted was of a grave nature and the possible sentence severe, and unfortunately the prisoners, whose first appearance it was in a criminal court, were not represented by an agent. The circumstances made it imperative that the prisoners should be given the opportunity of making a statement. It is quite true that, strictly read, the averments of the complainers are not perhaps relevant to infer that the statement which they say they would have made if they had been given an opportunity would have brought to the Judge's attention anything that he was not already aware of. But I am not inclined in the circumstances to subject the averments to a very severe scrutiny. It is of more importance to note the attitude of the respondent, for the course to be taken in this Court must depend to some extent on what is represented by the public prosecutor. We find that the complainers' averments are met with a general not a specific denial, and the very candid supplementary statements of the Lord Advocate make it abundantly clear that the denial is not based on exact or convincing or at any rate conclusive information. The point is therefore left in doubt, and it is a point of high importance. If that proved to be the opinion of the Court, then I understood that the Lord Advocate was not inclined to and did not resist some further inquiries with a view to make certain, if possible, what is at present uncertain. Accordingly I agree with your Lordship that there should be a remit to the Sheriff-Substitute in the terms suggested by your Lordship.

LORD ANDERSON—When the motion was made by the complainers for a remit, I had an uneasy feeling that we were being asked to go further than had been done in previous cases. The Lord Advocate rightly maintained that the process of suspension was jealously restricted by the Court to cases of real hardship, and that inquiry into the allegations made by a complainer is not readily allowed. My difficulty in assenting to a remit has been in great measure removed by these considerations—(1) That the Crown conceded that it is a matter of importance whether or not a prisoner has been asked before sentence if he had anything to say; (2) that the Crown was not at the debate in a position to deny the categorical averment of the complainers that the Sheriff-Substitute had not asked the complainers if they had anything to say; and (3) that the Lord Advocate in these circumstances did not seriously oppose the motion for a remit. This last circumstance will prevent this decision from being stressed as a precedent in justification of suspensions brought on unsubstantial or frivolous grounds. I therefore agree that the cause should be remitted to the Sheriff-Substitute for a report.

As to the duty of a Judge with reference to what is complained of, I desire to make these observations. There is no statutory

or common law duty on a Judge to ask a prisoner whom he is about to sentence if he has anything to say. Accordingly the failure of a Judge to make such a statement will not necessarily be followed by the quashing of the conviction or alteration of the sentence, although this result may follow in cases in which the failure of the Judge is held to amount to oppression. But although a Judge is not bound to do what is suggested, I am clearly of opinion that in every case he ought to do so for these reasons—(1) Because it is only matter of fair treatment of the prisoner to inform him that he may make a statement in mitigation of sentence; and (2) because the Judge, without any statement which might have been made in mitigation, is not seized of all the facts necessary to enable him to pronounce an appropriate sentence.

On 8th February 1924 the Court remitted to the Sheriff-Substitute to report whether before sentence was pronounced on the complainers opportunity had been given him of making a statement on their own behalf.

Counsel for the Complainers—Maclaren, K.C.—Crawford. Agents—W. G. Leechman & Company, Solicitors.

Counsel for the Respondent—The Lord Advocate (Hon. W. Watson, K.C.)—Maitland, A.D. Agent—John Prosser, W.S., Crown Agent.

COURT OF SESSION.

Saturday, February 9.

FIRST DIVISION.

[Lord Blackburn, Ordinary.]

M'CARROLL v. M'KINSTERY AND BLACKWOOD.

Process—Reduction—Res noviter veniens ad notitiam—Documentum noviter repperitum—Res judicata.

Process—Reduction—Fraud—Res Judicata—Averment that Letter Produced in Former Action Fraudulently Concocted—Extrinsic or Intrinsic Grounds of Reduction.

In an action by A against B and C for the reduction of decrees pronounced in a previous action between the same pursuer and defenders, in which A had been unsuccessful, regarding the property in certain shares standing in B's name in the register of a company, on the grounds of the decree having been obtained by fraud and (as amended in the Inner House) of *res noviter veniens ad notitiam*, A averred that the defenders having become aware that the pursuer could not produce a back letter granted by B to the pursuer acknowledging that B held the shares for the pursuer's behoof, had fraudulently concocted a back letter by B to C acknow-

ledging that B held the shares for A, in security of a loan by A to C, and for C in reversion, which had been founded on by the defenders in the previous action for the purpose of deceiving the Court; that in the knowledge that B had granted the back letter to A, both defenders had falsely deposed as to the signature of the back letter by B to C, and B with the concurrence of C had deposed that the back letter to C was the only back letter granted by him relative to the shares; that the back letter by B to A had been discovered after the date of the decrees in the possession of a friend to whom the pursuer had handed it along with other papers for safe custody; that owing to an error in the backing on the letter it had been retained by his friend in the belief that it related to other matters; that the pursuer after having failed to find it amongst the papers returned, and having been informed by the friend that all his papers had been returned, had attributed its loss to a fire which had taken place at his premises some time before. In the previous action A averred on record and stated at the proof that B had granted to him a back letter acknowledging that the shares were held for the pursuer but that he had lost it, that he had no knowledge of the back letter founded on by the defenders, that it was not signed on the date it bore, and was a concocted piece of evidence.

Held (diss. Lord Skerrington) that in view of the importance of the back letter by B to A and of the explanation of the cause why the document had not been produced in the previous action, the averments as amended were relevant as a condescence of *res noviter* and proof allowed.

Opinions per curiam that the averments as to fraud were not relevant grounds for reduction.

Lockyer v. Ferryman, 1877, 4 R. (H.L.) 32, 2 App. Cas. 519, and *Mackintosh's Trustee v. Stewart's Trustees*, 1903, 8 F. 467, 43 S.L.R. 363, followed.

Peter M'Carroll, Glasgow, *pursuer*, brought an action against James M'Kinstery, turf commission agent, Johnstone, and Dugald Blackwood, ironfounder, Johnstone, *defenders*, concluding for reduction of four interlocutors pronounced in a former action at his instance against the same defenders, regarding the property in certain shares in a limited liability company, and for declarator that the shares were the property of the pursuer. The summons also contained conclusions with reference to a letter founded on by the defenders in the former action, the transfers of the shares and for delivery of valid transfers to the pursuer.

The following narrative of the circumstances is taken from the opinion of the Lord Ordinary (Blackburn):—"In this action the pursuer M'Carroll seeks to reduce four interlocutors pronounced in a former action, dated June 1917, at his instance against the defenders in this action, M'Kinstery and Blackwood. These four interlocutors are

(*primo*) an interlocutor of the Lord Ordinary, Lord Ormidale, dated 5th April 1920, in which he assuizoid the defenders; (*secundo*) an interlocutor of the First Division, dated 1st June 1921, adhering; (*tertio*) and (*quarto*) interlocutors of the First Division, dated 16th May 1922, decerning for sums of £318, 18s. 11d. and £522, 18s. 9d. as expenses in favour of the first and second-named defenders respectively. In the former action referred to the pursuer sought to have it declared that certain preference and ordinary shares in J. Fyfe Donald & Company, Limited, which stood in the register of shareholders in the name of the defender M'Kinstery were truly the property of the pursuer. It was not matter of dispute that in or about the year 1908 the pursuer had advanced a sum of £1000 to the company, which was then in financial straits, and that Blackwood, who was the managing director of the company and the person chiefly interested in its success, then transferred to the pursuer the shares in question. Nor was it disputed that in June 1909 the pursuer of new transferred the shares to M'Kinstery, and that they were held by M'Kinstery as trustee. The pursuer averred that having himself got into financial difficulties in 1909 he made the transfer to M'Kinstery to protect the company from becoming involved in his own difficulties, and that M'Kinstery at the same date granted him a back letter acknowledging that he held the shares for behoof of the pursuer. This back letter the pursuer had lost prior to the raising of the former action, and he was unable to produce it at the proof. The defenders denied the pursuer's story, and in particular M'Kinstery denied that he had ever granted any such back letter as was founded on by the pursuer. They averred that the shares had originally only been transferred to the pursuer in security of his advance of £1000 to the company, and that they were transferred by him to M'Kinstery to be held for the pursuer in security of his advance, and for Blackwood in the event of the advance being repaid—an event which had occurred prior to the raising of the former action. In support of their case they founded on a letter of acknowledgment said to have been granted by M'Kinstery to Blackwood on 1st June 1909 setting forth that he held the shares on the above terms. This letter of acknowledgment was not produced in the former action as it too had gone amissing in the course of an earlier action relative to these shares, raised in 1916 by Blackwood against the pursuer, which does not appear to have come to judgment. In this earlier action the letter itself was lost while in the custody of the pursuer's advisers, but a copy—admittedly a true copy—was available, which was produced in the subsequent action, the decrees in which are now sought to be reduced. This letter of acknowledgment, according to the defenders' evidence in that action, had been signed in the presence of the pursuer, but the pursuer maintained that he had never seen or heard of it until it was produced by Blackwood in the earlier action against him in 1916, by

which date the defenders might have been well aware that his own back letter had been lost. The pursuer now avers (condescendence 20) that on or about 1st September 1921, after the reclaiming note in the former action had been disposed of, he recovered the original back letter on which he founded. It is said to have been discovered in the safe of a former business partner of his own, Francis M'Avoy, and to have presumably found its way there owing to a clerical error in the backing of the letter. Founding on this discovery, the pursuer moved in the Division for leave to lead fresh proof, and this motion was refused. He then applied to the House of Lords for leave to appeal *in forma pauperis*, and this application was also refused. He has now resorted to the present action, and pleads that the interlocutors having been obtained by fraud as 'condescended on,' they should be reduced."

The averments of the pursuer were, by leave of the Court, amended in the Inner House and were, *inter alia*, as follows, the amendments being shown in italics:—“(Cond. 10) . . . M'Kinstery in June or July 1909 signed and delivered to the pursuer a letter in the following terms:—‘Woodbrook, Elderslie, June 1909. Peter M'Carroll, Esq., wine and spirit merchant, Glasgow.—Dear Sir—With reference to the transfers executed by you in my favour during this month of (1) 200 preference shares of £1 each fully paid up, numbered 4501/4700 both inclusive, conform to certificate No. 11, dated 30th July 1908, and (2) 500 ordinary shares £1 each fully paid up, numbered 3501/4000 both inclusive, conform to certificate No. 2, dated 30th July 1908, both in J. Fyfe Donald & Co., Ltd., of the Johnstone Foundry, Johnstone, it is hereby understood that although said transfers were executed by you in my favour *ex facie* absolutely, these shares are held by me for your behoof, and I undertake to reconvey the same to you at any time you may require.—Yours faithfully, Adopted as holograph (*sic*) JAS. M'KINSTERY.’ . . . (Cond. 16) Upon 28th March 1916 the pursuer raised an action in the Court of Session for repayment of the said debt of £1000 with interest thereon from 4th May 1909. He obtained decree for the principal amount of the said debt and interest on 2nd June 1916, and for the expenses of the said action on 14th July 1916. These decrees were granted with consent of the defender Blackwood after negotiations, during which he conceded the pursuer's right to the said dividends and interest. . . . (Cond. 17) On 22nd July 1916 the defender Blackwood raised an action against the pursuer and the other defender for, *inter alia*, declarator that the shares in question were the property of the defender Blackwood, and subsequently in that action he produced, and for the first time founded on, a pretended letter of acknowledgment by the defender M'Kinstery in the following terms:—‘10 Walkinshaw Street, Johnstone, 1st June 1909.—I, James M'Kinstery, acknowledge that I hold 200 cumulative preference shares of one pound each fully paid, numbered 4501 to 4700 inclusive, and 500 ordinary

shares of one pound each fully paid, numbered 3501 to 4000 inclusive, in Messrs J. Fyfe Donald & Co., Ltd., in the first place, on behalf of Mr Peter M'Carroll for payment of the sum of one thousand pounds lent by him to you, and thereafter for your behalf on payment of that sum.—Yours, JAS. M'KINSTERY. Dugald Blackwood, Esq., ironfounder, Johnstone.’ The said pretended letter of acknowledgment bears to be addressed by one defender to the other and the pursuer is no party thereto. The pursuer in fact never saw or heard of the existence of such letter till it was produced as aforesaid. Its terms are untrue in fact except in so far as they bear that any right of the defender M'Kinstery was not in property but in trust. The pursuer believes and avers that the said pretended letter was not written or signed on the date it bears but at some much later date and after the settlement of the said action raised on 28th March 1916, with the intention on the part of these defenders of taking advantage of the state of the share register, and thereby in fraud of the rights of the pursuer as known to them both of defeating his right as owner to the now considerable value of the said shares. In any event the said letter of acknowledgment was not made or granted in the presence of or with the knowledge of the pursuer, and it was not in fulfilment of any agreement between the three parties whose rights it bears to be concerned with. Further, the granter of the said letter was not vested even *ex facie* in the property of said shares at the time of granting the same by any deed or deeds of trust. . . . Explained that the said letter went amissing accidentally. . . . The loss of the said letter has deprived the pursuer of the opportunity of proving by examination of the ink and paper the age of the handwriting thereon. . . . (Cond. 18) On 7th June 1917 the pursuer raised in the Court of Session an action against the defenders. The conclusions of the summons therein were in the same terms as those of the present summons excepting the conclusions for reduction of the pretended decrees in that action. After sundry procedure in the said action proof was led in July 1919 before the Lord Ordinary (Lord Ormidale). Andrew Alston Cameron, the defenders' law agent, was the first witness for the defenders. They heard his evidence and thereafter entered the witness-box. *Inter alia*, the defender M'Kinstery denied falsely upon oath that he had signed more than one back letter relating to the said shares. His testimony as well as that of the said Andrew Alston Cameron and the other defender (Dugald Blackwood) was adversely commented upon by the Lord Ordinary, but upon 5th April 1920 his Lordship with hesitation assoilzied the defenders upon the ground that there was no confirmation of the pursuer's oath to the effect that he had held any back letter by the defender M'Kinstery relating to the said shares. . . . (Cond. 19) A reclaiming note having been presented by the pursuer to the First Division of the said Court on 12th May 1920 the defender M'Kinstery, by minute lodged in the said

action in October 1920, stated that he did not propose to take part in the hearing in the Inner House except upon his claim for expenses. Thereafter their Lordships of the First Division adhered on or about 1st June 1921 to the said pretended interlocutor. It is believed and averred that the refusal of the reclaiming note was due only to the fact that the pursuer was unable to produce the back letter founded on by him. (Cond. 20) On or about 1st September 1921 the pursuer was informed by Francis M'Avoy, spirit merchant, Cumberland Street, Glasgow (a former partner in business with the pursuer), that the latter had in his safe a document relating to shares and signed by the defender M'Kinstery. Upon the following day the said Francis M'Avoy took from his safe and handed to the pursuer the back letter quoted in article 10 hereof. In and since 1916 the pursuer had searched in his repositories for the said letter. His failure to discover it earlier than he did is due to the fact that the backing on the letter erroneously purports that the letter was granted by Francis M'Avoy in favour of the pursuer. Owing to that error the letter had been retained by M'Avoy under the belief that it related to certain dealings between him and the pursuer. . . . *It had been handed by the pursuer to M'Avoy with other papers for safe custody in the autumn of 1909, when the pursuer was leaving Glasgow for Ireland on account of ill-health. When the pursuer returned to Glasgow he received back from M'Avoy what both of them believed to be the whole papers originally handed over. When the pursuer searched his repositories for the back letter in 1916 he could not find it. He asked M'Avoy if he had any papers belonging to him and M'Avoy informed him that he had returned the whole papers. The pursuer thereupon imputed the loss of the back letter to a fire which had taken place in his premises on 20th December 1911, and which had in point of fact destroyed some of his other papers. In these circumstances the pursuer was reasonably ignorant of the existence of said back letter at and subsequent to the commencement of the proceedings which resulted in the interlocutors sought to be reduced. . . . The said back letter is produced. . . .* Explained that after the discovery of the said back letter in September 1921 the pursuer and his advisers afforded without delay full facilities to the defenders and their advisers, including the said Andrew Alston Cameron, for examining the said back letter. . . . (Cond. 21) The pretended interlocutors or decrees sought to be reduced were obtained by fraud on the part of the defenders. *When the defenders became aware, as they did early in 1916, that the pursuer was unable to produce the back letter referred to in article 10 hereof, the defenders acting in concert conceived a scheme for the purpose of deceiving the Court and depriving the pursuer of the shares which they well knew were his property.* In particular, they fraudulently concocted the pretended letter of acknowledgment of which reduction is sought, and they falsely and fraudulently deposed at

the said proof that the said pretended letter was signed in June 1909. Moreover, the defender M'Kinstery, with the consent of the other defender and in his hearing, falsely and fraudulently represented on oath at the said proof that the said pretended letter was the only back letter granted by him relative to the said shares. All this they did in the knowledge that the genuine back letter founded on by the pursuer had been granted to him. (Cond. 22) After the discovery of the back letter on 1st September 1921 the pursuer moved in the First Division of the Court of Session for leave to have the proof in his action against the defenders opened up and additional evidence led relative to the discovery of said back letter, but this was refused by the Court upon the ground that it was open to the pursuer to raise an action of reduction. Later on he appealed to the House of Lords, and applied for leave to proceed with the appeal *in forma pauperis* against the interlocutors of 5th April 1920 and 1st June 1921, but leave was refused for the reason that the First Division had adhered to the judgment of the Lord Ordinary. . . .”

The pursuer *pleaded, inter alia*—plea-in-law 1 (a) shown in italics being added by amendment when the case was in the Inner House—“1. The said pretended interlocutors or decrees having been obtained by fraud as condended on should be reduced as concluded for. 1 (a). *The back letter quoted in article 10 hereof being a documentum noviter repertum, and the pursuer having become aware of its existence under circumstances which constitute res noviter veniens ad notitiam, decree of reduction should be pronounced as concluded for.*”

The defender M'Kinstery *pleaded, inter alia*—plea-in-law 12 shown in italics being added to meet the pursuer's amendment—“1. *Res judicata, et separatim*, in respect that the expense of the former action is unpaid and resting-owing, the pursuer ought not to be allowed to proceed without finding caution for expenses in this action. 5. The averments of the pursuer being irrelevant and insufficient to support the conclusions of the summons the action ought to be dismissed. 11. *Separatim*—This defender having granted the back letter dated 1st June 1909 could not derogate from his own grant by executing any similar letter, and said letter founded upon by the pursuer in article 10 is thus inept. 12. *The averments of res noviter contained in the pursuer's minute being irrelevant ought not to be remitted to probation.*”

The defender Blackwood *pleaded, inter alia*—plea-in-law 11 shown in italics being added to meet the pursuer's amendment—“1. The action is irrelevant as laid. 2. The whole questions at issue in this action having already been decided between these parties absolutor should be granted. 9. The whole questions of patrimonial right raised in the present action having been determined between these parties by a final judgment of the Court of Session, absolutor should be granted. 10. The document quoted in the 9th article (if genuine, which is denied) not being habile to affect the

rights of this defender as presently constituted in the shares in question, absolvitor should be granted. 11. *The averments in the original record and as amended by the minute of amendment purporting to instruct res noviter veniens ad notitiam being unfounded in fact, this defender is entitled to absolvitor.*"

The Lord Ordinary (BLACKBURN) sustained the first plea-in-law for the defender Blackwood and dismissed the action.

Opinion.—[After the foregoing narrative]—"The question I have to decide is whether the fraud 'condescended on' is such as to entitle the pursuer to the proof which he asks or whether the action should be dismissed as irrelevant, and I have found the question one of some difficulty.

"There is no doubt that a decree obtained from the Court by fraud may be reduced by the unsuccessful party on that ground. But every fraud is not sufficient to entitle the unsuccessful party to this remedy. No greater fraud can be committed on the Court than by the deliberate perjury of witnesses, but it is settled that this form of fraud, however clearly it may be substantiated, does not provide a relevant ground for the reduction of a decree by the unsuccessful party. Here the principle of *res judicata* intervenes as between the parties to the action, and the question whether the evidence at the original trial was trustworthy or not is held to have been settled as between them by the Court which pronounced the decree sought to be reduced. The most recent case, so far as I am aware, in which the law above stated was given effect to is that of *Mackintosh's Trustees v. Stewart's Trustees*, 1906, 8 F. 467. But in the opinions in that case the circumstances under which a reduction on the ground of fraud may competently be raised were considered, and there are passages in the opinions which have a direct bearing on the averments in the present action. Lord Kinnear, who gave the leading opinion after a review of the authorities in which he quotes with approval passages from the opinion of L.J. James in *Flower v. Lloyd*, which are to be found in the first report of that case in 6 Ch. Div. at pp. 301-2 (and incidentally not under the reference given in the Session Cases to the second report in 10 Ch. Div. 327), goes on to say (p. 473)—'If a judgment is to be set aside, therefore, on the ground of fraud, it must be on allegations raising a distinct and separate issue on which a verdict may be obtained independently of any re-trial of the question already decided. The proper order of procedure is clear. The pursuer must in the first place reduce the judgment he complains of on the ground of fraud, and it is only when that has been done that he can have his case tried over again. But the pursuer in this case simply seeks to revive the original dispute and for that purpose repeats in his condescendence every single matter which was in controversy before. There is no reason whatever alleged for setting aside the judgment except that on these matters the defender gave false evidence. But that was just the

question the learned Judge had to decide in the former case, and on the pursuer's own showing his decision cannot be reduced without re-trying the whole case. The proposal is not to reduce the judgment in order to re-try the case but to re-try the case in order to reduce the judgment.' Lord President Dunedin expresses a similar view on page 474, where he says—'Therefore if reduction of a decree is to be obtained on the ground of fraud, it can only be where the fraud is something extrinsic to what happened in the former trial, and whether that can be made out is an issue of fact. Subornation of perjury is a plain issue of fact, and can be proved by examining witnesses as to what actually happened. But when it is the evidence of one of the parties himself that is said to be perjured, how are you to proceed to prove that he suborned himself to commit perjury? That question is an inquiry into what happened in the man's own mind, and that could not be proved by anything extrinsic to the former trial but only by drawing an inference from what actually happened in the former trial. In other words it would simply amount to going back to the old question that was decided in the previous trial, and that, as I have said, is not competent.'

"Now the record in the present action can hardly be said to have been framed with much regard to the opinions of these two learned Judges. The reductive conclusions in the summons already referred to are followed by six or seven other conclusions which according to the pursuer's own averment, condescendence 18, are in the same terms as the conclusions of the summons in the former action between the parties. So far as the condescendence is concerned the first seventeen articles if not in the same terms are at least the same in substance as the whole condescendence in the former action. In particular the averments in condescendence 17 in this action, which refer to the fraudulent concoction of the letter of acknowledgment produced by the defender, are almost verbatim the same averments which appear in condescendence 15 of the former action. Articles 18 and 19 of the condescendence in this action narrate the progress of the former action in Court with some averments that both the defenders committed perjury at the proof in that action. Condescendence 20 tells of the recovery by the pursuer of his missing back letter, and it is not till condescendence 21 that the grounds of reduction are set forth. These include the bald averment that the letter of acknowledgment had been fraudulently concocted by the defenders and further averments of perjury by the defenders at the proof in the former action, which, as I have already said, do not provide a competent ground of reduction. I do not doubt, however, that the pursuer would be entitled to decree in this action if he could establish as a separate issue of fact that the letter of acknowledgment was fraudulently concocted by the defenders. The opinions delivered in the former action leave no doubt in my mind that it was the production of this letter and the inability of the

pursuer to produce his own back letter which led to his failure to prove that he was the true owner of the shares, which was the question actually at issue in that action. And even although in the former action the authenticity of the letter was the subject of much evidence and of anxious consideration by the Lord Ordinary and the Judges of the First Division, I should nevertheless have had no hesitation in allowing the pursuer to proceed to a proof in this action if he had anywhere averred that he was prepared to lead evidence entirely extrinsic to what happened in the former action to establish as a separate issue that the letter of acknowledgment had been concocted. But I can find no such averments. It is sufficiently obvious from the terms of his record that what he proposes to do is to lead the same evidence as he led in the former action, the only additional evidence being that provided by his recovered back letter. Assuming that this back letter is genuine, which it is fair to say the defenders deny, the proof would then be sufficient to establish that the pursuer was the true owner of the shares (see the opinions of Lord Ormidale and the Lord President in the former action), and the fraudulent concoction of the letter of acknowledgment could only be an inference from this established fact. That this is the intention of the pursuer if a proof is allowed I entertain no doubt, because his counsel moved for a proof on the whole conclusions of the summons, and the suggestion that in any event the proof should be limited to the reductive conclusions was resisted on the ingenuous ground that it would lead to unnecessary expense as the whole of the evidence required to establish the ownership of the shares would require to be led to support the reductive conclusions. This would appear to me to be exactly what Lord Kinnear described as re-trying the case in order to reduce the judgment instead of first reducing the judgment in order to re-try the case. The only new fact adduced in this action by the pursuer is the recovery of the back letter, which may well be sufficient evidence that the decision in the previous case was wrong, and that he was in fact the true owner of the shares as he then contended. That question, however, is *res judicata* as between him and the defenders and cannot now be gone into. But the recovery and production of the back letter is not *per se* evidence that the letter of acknowledgment was fraudulently concocted by the defenders, and there is no other averment on record extrinsic to what happened in the former action to support this ground of reduction. The letter of acknowledgment itself has admittedly been lost and is not therefore available for scrutiny or examination. Under these circumstances I feel that I have no alternative other than to sustain the defenders' first plea to the relevancy and to dismiss the action. I have reached this conclusion with great regret, as one cannot read the proof in the former action and the opinion of Lord Ormidale without reaching the conclusion that if the

back letter now recovered is proved to be authentic a deliberate fraud of the gravest character was perpetrated on the Court in the former action which has resulted in serious injustice to the pursuer. This may provide sufficient reason for a higher Court allowing the whole matter to be reopened in this action, but in view of the authority to which I have referred and which I regard as binding on me I do not feel at liberty to take such a course. . . ."

The pursuer reclaimed, and the case was continued at the first hearing in the Inner House to allow the pursuer to amend the record. The pursuer thereafter amended his record, and argued—The averment now on record that the defenders had concocted the back letter, founded on by them in the former action, after they had learned in an earlier action that the pursuer could not produce his back letter, with the deliberate intention of defrauding the Court, raised a new issue of fraud which was not before the Lord Ordinary. This fraud was quite different from the fraud averred in the former action, which was really fraud against the Registrar of Companies, and its averment was a relevant averment of *res noviter veniens ad notitiam* and also of fraud which was equivalent to subornation of perjury as a ground of reduction. This was not contrary to *Mackintosh's Trustee v. Stewart's Trustees*, 1906, 8 F. 467, 43 S.L.R. 363. That case did not decide that the perjury of a party was not a ground for reducing a decree, but if it did so decide then the judgment was not in accordance with the authorities upon which it was founded. In *Flower v. Lloyd*, 1877, 6 Ch. Div. 297, 1878, 10 Ch. Div. 327, there was no support for such a view except in the *semble* of the head note of the later report. In *Lockyer v. Ferryman*, 1876, 3 R. 882, 13 S.L.R. 572, 1877, 4 R. (H.L.) 32, the decision was on relevancy and *mora*. The decisions in *Macpherson v. Tytler*, 1839, 1 D. 738; *Gore v. Stacpoole*, February 17, 1813, 1 Dow, 18, and the *Duchess of Kingston*, 1776, 2 Smith's Leading Cases, 713, at p. 738, were against such a view. The back letter by M'Kinstery to pursuer was also in itself *res noviter*—*Coul v. County of Ayr*, 1909 S.C. 422, 46 S.L.R. 338; *Bannerman v. Scott*, 1846, 9 D. 163; *Robinson v. Smith*, [1915] 1 K.B. 711, *per* Buckley, L.J., at p. 713; *Gairdner v. Macarthur*, 1915 S.C. 589, 52 S.L.R. 427. It was material, and the pursuer's failure to produce it in the former action could not reasonably be said to be due to his fault. *Stair* iv, 1, 44, and *Erskine* iv, 3, 3, were not in accordance with later practice. Where reasonable efforts had been made to find a document but had failed, the Court would allow a new trial on its later discovery, if it was necessary in the ends of justice to do so. That was what the decision came to. In *Byres v. Forbes*, 1866, 6 Macph. 38, there had been no reasonable attempt to produce the document in the former action.

Argued for the respondent M'Kinstery—Notwithstanding the amendment the case was still ruled by the decision in *Mackintosh's Trustee v. Stewart's Trustees* (*cit.*)

which the Lord Ordinary had followed. Any form of perjury was a fraud upon the Court but was not a ground of reduction. To make it so the essentials of *res noviter* must be present—*Lockyer v. Ferryman (cit.)*, per Lord Hatherley, at 4 R. (H.L.) 39. In the present case these essentials were absent both as regards the fraud and the pursuer's back letter. The fraud averred was the same as that averred in the former case, and the pursuer's excuse for not producing the letter merely proved that he had a previous knowledge of it. There was therefore no *res noviter*—*Barbour v. M'Gauchie*, 1828, 7 S. 18; *Campbell v. Campbell*, 1865, 3 Macph. 501, per the Lord President, at p. 504; *Lockyer v. Ferryman (cit.)*, per the Lord Justice-Clerk, at 3 R. 897, Lord Gifford, at 3 R. 912, 13 S.L.R. 572, and per Lord Blackburn, at 4 R. (H.L.) 42; *Stair*, iv, 1, 44; *Ersk.* iv, 3, 3. Reference was also made to the Judicature Act 1825 (6 Geo. IV, cap. 120), sec. 10.

Argued for the respondent Blackwood (who also adopted the argument for the respondent M'Kinstery)—The pursuer's back letter from M'Kinstery was *documentum veniens ad notitiam*. That was not *res noviter*—*Shand's Practice*, i, 487; *Byres v. Forbes (cit.)*. The pursuer was not entitled to another trial because he averred that he remembered a document which he had not even mentioned at the former trial.

At advising—

LORD PRESIDENT (CLYDE)—The primary object of the present action is to reduce the decrees of this Court by which a former action between the same parties was decided adversely to the pursuer.

The question at issue in the former case was as to the property of certain shares in a limited company which the pursuer had transferred to the defender M'Kinstery, and which stood in the latter's name on the company's register. It was common ground among all the parties that M'Kinstery held the shares in a fiduciary capacity. The pursuer's case was that he had originally acquired the shares at a time when, according to Lord Ormidale who heard the case in the Outer House, they were of but little value, as consideration for the security (cautionary and other) supplied by him to the bank on the company's account at the request of the defender Dugald Blackwood, who was interested in the company, and that he subsequently put the shares into M'Kinstery's name. It appeared that the object of so doing was the unworthy one of defeating the claims of certain creditors. He also said on record and in the witness-box that M'Kinstery gave him a holograph acknowledgment to the effect that the shares were held on his account, which the pursuer had retained in his possession for some time but which he had lost. Being unable to found on this alleged back letter which he could not produce, he presented his case independently of it. The question of the property in the shares thus came to turn on the conflicting accounts given by the pursuer and by the defenders respectively of the history of the shares and of

the dealings with them; and the pursuer's allegation about the holograph acknowledgment never came into the case except as a point against him, in respect that while such an acknowledgment would have been a voucher of his rights (naturally to be preserved and produced by the pursuer) he was neither able to produce it nor to give any satisfactory account of its loss. In the opinion of Lord Ormidale, who heard the case in the Outer House, the alleged holograph acknowledgment was never so much as mentioned until the very end of the opinion, where it is referred to in a sentence in the sense I have just explained. The defenders founded on a back letter which they said was the only back letter ever granted in relation to the shares. It bore to be written by M'Kinstery to Dugald Blackwood, and in it the shares were said to be held for the pursuer in security for a sum of £1000 lent by the pursuer to Dugald Blackwood, and for the said Dugald Blackwood in reversion. This back letter generally bore out the version of the dealings in the shares which the defenders stated on record and supported in evidence, and was a material factor in the decision of the case against the pursuer. Although the pursuer denied all knowledge of this back letter he was unable to establish his allegations on record to the effect that it was not signed on the date it bore and was in fact a concocted piece of evidence.

It is obvious from this brief narrative of the circumstances of the former action that if the pursuer had been able to produce the holograph acknowledgment which he had lost the whole aspect of the case must have been changed. Not only would his own evidence have stood on a solid documentary basis, but the defence actually made could hardly have succeeded, and the question of the genuineness of the back letter would have appeared in a totally different light. In affirming the judgment of Lord Ormidale I referred, in the opinion I delivered in this Division, to the lost holograph acknowledgment as a document which would have proved the pursuer's case if it had existed and was in the terms he alleged. In their literal sense these words may be thought an over-statement, but they hardly over-estimate the importance of the lost acknowledgment in its bearing on the true turning-points of the case. It must be remembered that Lord Ormidale had found himself unable to place reliance on the verbal testimony of either side.

The present action is virtually a duplicate of the former one (with conclusions for the reduction of the decrees pronounced in the former action superadded), except that the pursuer is now able to produce and found upon a formal acknowledgment of his property in the shares bearing to be signed by M'Kinstery. *Prima facie*, therefore, the all-important document which would have changed the whole aspect of the former case stands in the forefront of the present one. I say *prima facie* because the genuineness of the document is not admitted. When the present case was before Lord

Blackburn in the Outer House the only plea upon which the conclusions for reduction of the former decrees were based was one of fraud, and Lord Blackburn found himself unable to take the case out of the principle exemplified in *Mackintosh's Trustee v. Stewart's Trustees*, 1906, 8 F. 467. At the same time his Lordship says that he has "reached this conclusion with great regret, as one cannot read the proof in the former action and the opinion of Lord Ormidale without reaching the conclusion that if the back letter now recovered is proved to be authentic, a deliberate fraud of the gravest character was perpetrated on the Court in the former action which has resulted in serious injustice to the pursuer." The principle of *Mackintosh's Trustee* is that the fraud implied in the perjury of witnesses—even if the witness is a party—is not a ground on which a *res judicata* can be set aside by reduction, and the grounds on which the principle rests are set out with great clearness by Lord Cairns in a passage of his judgment in *Lockyer v. Ferryman* (1887, 4 R. (H.L.) 32, at pp. 35-6), which is quoted by Lord Kinnear in *Mackintosh's Trustee*, 8 F. 467, at p. 472. The only use the pursuer made of the newly-discovered acknowledgment in his argument before Lord Blackburn was to contend that in a fresh proof the evidence he formerly gave would receive an important corroboration, while that given by his opponents, both with regard to the dealings with the shares and with regard to the back letter would be shown to have been false. I do not think in these circumstances I could have found any ground to differ from the result reached by Lord Blackburn.

But in the course of the argument before this Division the pursuer amended his record by adding a plea to the effect that the acknowledgment produced by him in the present action "being a *documentum noviter repertum*, and the pursuer having become aware of its existence under circumstances which constitute *res noviter veniens ad notitiam*, decree of reduction should be pronounced as concluded for." He at the same time materially amended his condescendence by adding to it explanations of the circumstances in which, as he contends, he was excusably ignorant of the existence and whereabouts of the acknowledgment until after the former action had been decided against him. Two questions thus arise for decision—Is the new plea well founded in law? And is the record as amended relevant to support it?

To the first of these questions I think none but an affirmative answer can be returned. It is, no doubt, true that as facilities for the preservation of documents of importance and for the reasonably final ascertainment of matters of fact have increased, the task of successfully assailing a *res judicata* has grown more and more formidable. But Erskine's statement (Inst. iv, 3, 3) that "in the opinion of Stair and of Mackenzie the Session may also reduce their own decrees upon the emerging of any new fact or voucher in writing, not pleaded formerly by

the party, if it shall appear that it was not known to him before decree, or that he did not omit it wilfully with a view to protract the cause"—though it may have had in view a somewhat more generous practice in the admission of such actions than now prevails—does not differ materially from the statement of the modern law on the subject by the learned author of Mackay's Manual of Practice (p. 624)—"Where a relevant and sufficient averment of *res noviter veniens ad notitiam* is made, the decree" (he is speaking of decrees in the Court of Session *in foro*) "may be brought under reduction so as to admit of a new inquiry into the merits. The earlier authorities if liberally interpreted would favour a laxer view of *res noviter* than is now entertained, but their opinions require qualification. Where the new fact is to be proved by parole the source of the new information must be specifically stated, and it must be explained why it was not within the reach of the party during the previous suit. Further, it must be a fact sufficient if established to render the former judgment erroneous. Where the new fact rests on documentary evidence essential to the case there is less difficulty in admitting reduction. If the document is truly one which no reasonable diligence could have recovered, there can be no doubt the reduction is competent. Even where there has been remissness, if the document is distinct evidence of the validity of the claim and the injustice of the judgment, reduction would not, it is thought, be excluded, though the pursuer may be found liable in expenses." Leaving aside the expression of personal opinion in the last sentence, this passage is supported by the authorities quoted by the learned author, to which may be added that of Lord Chancellor Cairns in the *Phosphate Sewage Company v. Molleson* 1879, 6 R. (H.L.) 113, at p. 117.

The second question as to the relevancy of the averments now made by the pursuer with regard to his excusable ignorance of the actual existence and whereabouts of the document is more difficult. The onus resting on the pursuer in this matter is a somewhat heavy one, as may be seen by reference to such cases as the *Magistrates of Dumbarton v. Campbell* (18th November, 1813 F.C., 5 Dow 286) and *Grahame v. Grahame* (1821, 1 S. 35, 1 W. & S. 353), which strongly discountenance actions of reduction of judicial decrees where it can truly be said that the pursuer was remiss in not discovering the new voucher in writing in time for use in the first case. Now what the pursuer says is this—That on a certain date subsequent to the decision of the former case against him Francis M'Avoy, spirit merchant in Glasgow, who had formerly been a partner of his in business, produced to him an acknowledgment by M'Kinstery relating to the shares, and that this acknowledgment (which is now produced) is in the form of a letter written by M'Kinstery to the pursuer and adopted by him as holograph referring specifically to the shares in question, and declaring that while the transfers to M'Kinstery were *ex facie* absolute, they are held for the pursuer and will be reconveyed to

him on demand. He explains that in 1909 he left Glasgow for Ireland owing to ill-health, and when leaving left a number of papers, including the acknowledgment, with Mr M'Avoy for safe keeping; that when he came back these papers—including (as both Mr M'Avoy and the pursuer believed) the whole of them—were returned to him; that when in 1916 the pursuer failed to find the acknowledgment in his own repositories he asked Mr M'Avoy if he still had any papers belonging to him and was told by Mr M'Avoy that the whole of them had been returned; and that in these circumstances the pursuer concluded that the acknowledgment must have been destroyed in a fire which occurred in his premises in 1911. He says further that—as appears from the document itself—the acknowledgment was erroneously backed with Mr M'Avoy's name, and that this explains why Mr M'Avoy retained it under the belief that it referred to certain dealings between him and the pursuer. Now if the pursuer and Mr M'Avoy, or indeed either of them, had been persons accustomed to the methods adopted by professional men in handling the papers of their clients the document could hardly have gone amissing in this way, but I am not prepared to apply so high a standard as this to the actings of ordinary people like the pursuer and his ex-partner. Nor is it in my opinion possible to assimilate the present case to those in which the plea of *novum documentum repertum* has been rejected because the document has lain forgotten in the party's own repositories—*Magistrates of Dumbarton v. Campbell*—or in those of an agent. The acknowledgment now produced bears to have been prepared by a firm of law agents, but so far as appears they had nothing to do with the law agent referred to by the pursuer in condescence 9 as being the pursuer's law agent before his cessio (which was granted in July of 1909) and as having advised him—either personally or through a brother who is said to have acted as his assistant—in the course of it. The cessio lasted till 1916. The record is not as explicit as might be desired with regard to this point, for if it appeared that the firm of law agents who prepared the acknowledgment were instructed by the pursuer to do so, he might well be held seriously remiss in not attempting to trace the acknowledgment through them when he found it wanting. It is, however, in vain to anticipate how the circumstances may appear when the facts averred on record and the pursuer's explanations regarding them are inquired into. I cannot think it would be just in the circumstances of this case to refuse to the pursuer an opportunity of establishing his right to have the decrees in the former case set aside, and I think—especially considering the great importance of the document—his averments as amended in this Division are sufficiently relevant to require an allowance of proof.

If your Lordships agree in this it is necessary to consider the limits of the proof. If having regard to the averments of the parties and the nature of the case it had been possible to limit the proof in the first instance

to those averments which are relevant to the conclusions of reduction of the former decrees, it might have been right to do this, and condescences 10 and 20 and the relative answers would have contained the primary matters for inquiry. But the answers for the defenders—particularly those to condescence 10—not only challenge the genuineness of the acknowledgment now produced, but might in themselves involve a wide range of inquiry little less comprehensive than the whole dispute between parties. In any view I do not think the nature of the present case admits of any limitation of the proof, which should, I think, be a general one.

LORD SKERRINGTON—In the present action the summons in which was signeted on 9th June 1922, the pursuer Peter M'Carroll seeks to reopen a dispute which in appearance at least was finally determined adversely to him by a decree of absolvitor dated 1st June 1921 pronounced *in foro* by this Division of the Court in an action at his instance against the persons who are cited as defenders in the present action. The summons in the former action was signeted on 7th June 1917. Its subject-matter was the same as that of the present action, viz., the beneficial ownership of certain shares in a limited company which are and have been registered in name of the defender James M'Kinstery ever since June 1909, when the pursuer (who was at that time the registered owner) signed a transfer thereof in his favour. The *medium concludendi* was also the same. The pursuer claimed (as he again claims) that he was and is, in virtue of his original radical right, the beneficial owner of these shares—the transfer to Mr M'Kinstery having been granted solely for the purpose of concealing this asset from his creditors. M'Kinstery has all along admitted that he has no beneficial interest in the shares, but he sided (and still sides) with the defender Dugald Blackwood in maintaining that the shares were transferred to him by the pursuer primarily in order to secure the repayment of a sum of £1000 lent by the pursuer to the defender Blackwood, and thereafter for behoof of the last-named defender. The advance by the pursuer has been repaid, but the pursuer's case is that the defender Blackwood transferred the shares to him in July 1908 as a reward for providing the loan, and not by way of security for its repayment. The defender Blackwood produced and founded upon a holograph letter of acknowledgment in his favour (referred to in the former proceedings as No. 13) which was written and signed by M'Kinstery and which states the terms of the trust as above set forth. It is dated 1st June 1909. In the previous action (as he does in the present one) the pursuer averred that this letter was not written or signed on the date it bears but seven years later, with the intention on the part of the defenders of taking advantage of the state of the share register and thereby defrauding the pursuer of his right as owner of the shares. In the former action (as he does in the present action) the pursuer concluded for reduction of this letter.

From the foregoing statement it will be seen that the plea of *res judicata* affords a complete answer to the pursuer's attempt to reopen the controversy as to the ownership of the shares unless he can succeed in reducing the decree of absolvitor pronounced in the former action. Accordingly the first conclusions of the present action are for reduction of four interlocutors of the Lord Ordinary and of the Inner House disposing of the merits and the expenses of the former action adversely to the pursuer. Whether the present action is regarded (as it was in the debate on the original pleadings before the Lord Ordinary) primarily as a reduction of a decree *in foro* upon the ground of fraud alleged to have been practised by the defenders upon the pursuer and the Court, or whether it is regarded (as it was in the debate on the amended pleadings in the Inner House) primarily as a reduction upon the ground of *res noviter*, the pursuer cannot advance a step unless he relevantly avers the discovery of some fact or some document of the existence of which he was excusably ignorant at the time of the former proceedings, and which fact or document is so material as to make it essential to justice that the case should be re-tried in the new light thrown upon it by that fact or document. For the decision of the present case it is not necessary to consider whether the standard of what I have called materiality may not be less rigorous in a case where the defenders are alleged to have practised a fraud upon the pursuer and upon the Court as compared with a case in which it is sought to deprive an admittedly honest litigant of the benefit of a judgment in his favour.

The jurisdiction which the pursuer asks us to exercise is of an exceedingly delicate character. The Court has to reconcile as best it can the sanctity which properly attaches to a *res judicata* with the necessity for preventing so far as possible its rules of procedure from being used as the means of perpetrating or at least of perpetuating what is alleged to be a flagrant injustice. Hard-and-fast rules are impossible in the exercise of such a jurisdiction, but I venture to think that its principles and the manner in which they should be applied have not been more clearly and more usefully expounded than they were by Lord Hatherley in the case of *Lockyer v. Ferryman* (1877, 4 R. (H.L.) 32, at p. 39), and by Lord Cairns in *Phosphate Sewage Company v. Molleson*, 1879, 6 R. (H.L.) 113, at p. 117. In the former case Lord Hatherley observed—"It has been well established—and one is thankful that it is so well established—that there is nothing that can protect the perpetration of a fraud. The perpetration of a fraud in the obtaining of a judgment or in the obtaining of a private Act of Parliament, or in any transaction in which solemn instruments are obtained or solemn acts done, will vitiate the whole proceedings—where it is alleged by one of the parties that the transaction was a farce, that it was not a *bona fide* transaction but a fraudulent one, no time probably would be held to be too late to open up such a transaction where it could

be made out clearly and distinctly that the circumstances connected with that fraud had recently come to the knowledge of the party. But I apprehend that in that as in every other case the necessity of the rule as to *noviter inventa* applies, and a solemn decision come to after the case has been heard in the presence of all the parties, and after the testimony of the witnesses has been given, cannot be reopened unless it shall, to the satisfaction of those who are applied to to reopen the case so long ago decided, be made out that there is reasonable ground for believing that if the case were reopened facts could be established which could not have been established by any reasonable diligence by the party making the application before the time of his making such application." Though the objection of *mora* does not apply to the present case, Lord Hatherley's observations are in other respects entirely in point. In the other case cited Lord Cairns said—"As I understand the law with regard to *res judicata*, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to reopen that litigation merely by saying that since the former litigation there is another fact going exactly in the same direction with the facts stated before—leading up to the same relief which I asked for before—but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say—I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not, by reasonable diligence have been ascertained by me before. Now I do not stop to consider whether the fact here, if it had come under the description which is represented by the words *res noviter veniens ad notitiam*, would have been sufficient to have changed the whole aspect of the case. I very much doubt it. It appears to me to be nothing more than an additional ingredient, which alone would not have been sufficient to give a right to relief which otherwise the parties were not entitled to. But it is unnecessary to dwell upon that, because it is perfectly clear upon the statement of the present appellants themselves that this fact was within their knowledge before their proof was led in the former action, and they were just as free to have had the record opened and to have had it stated as if it had come to their knowledge before the record was closed." I have quoted these observations at length because I cannot help thinking that the Lord Ordinary has to some extent misunderstood what was decided by this Division of the Court in the case of *Mackintosh's Trustee v. Stewart's Trustees*, 8 F. 467. I do not read that decision as throwing any doubt upon the "general doctrine" which was laid down by the Lord President (Ingliston) in *Breadalbane v. Breadalbane's Trustees*,

1868, 6 Macph. 807, at p. 816—"There can be no doubt that if a judgment of a Court is obtained by fraud—that is to say, if the person who obtains the judgment, although it be a judgment *in foro*, comes into Court with false representations, which he knows to be false, for the purpose of obtaining his decree upon these false representations, and succeeds in deceiving both his opponents and the Court—that is a relevant ground of reduction. That was affirmed without hesitation by the House of Lords in the case of *Shedden v. Patrick* (1854, 17 D. (H.L.) 18, 1 Macq. 535) with reference to a judgment in the Court of last resort, and I cannot doubt as a general doctrine that that is perfectly sound. The only question may be whether the fraud here alleged is sufficiently well alleged in point of specification and detail."

The new matter or *res noviter* upon which the pursuer founds for the purpose of entitling him to have the dispute as to the ownership of the shares reopened is averred in article 20 of the condescendence in the present action as amended in the Inner House. It arises out of a discovery alleged to have been made by a man named M'Avoy on or about 1st September 1921 of a document in his safe which turned out to be the back letter quoted in article 10 of the same condescendence. This document is dated "June 1909," and bears to have been prepared by a firm of solicitors. It is addressed to the pursuer, and it purports to have been "adopted as holograph" and to be signed by "Jas. M'Kinstery." It states that the latter holds the shares for behoof of the pursuer, and that he undertakes to reconvey them to the pursuer at any time he may require. The following is, I think, a fair summary of what the pursuer avers and of what he omits to aver when endeavouring to explain why he did not produce the back letter in his favour at the proper time. He avers that in the autumn of 1909 he handed it with other papers to M'Avoy, a former partner in business, for safe custody when he was leaving Glasgow for Ireland on account of ill-health. He does not state that he put his papers in an envelope or that he tied them in a bundle, or that he did anything else to avoid the risk of any of them going astray through being accidentally mixed up by M'Avoy with his own papers. He avers that on his return to Glasgow he received back what both he and M'Avoy believed to be the whole papers originally handed over to the latter, but he does not aver that he checked the documents at the time, nor does he explain why he did not do so. He apparently did not trouble himself further about the matter until 1916—some seven years later—when he avers that he unsuccessfully searched his repositories for the back letter in connection with an earlier stage of the present controversy. He avers that he then asked M'Avoy if he had any papers belonging to the pursuer, and that M'Avoy replied that he had returned the whole papers. The pursuer avers that he thereupon imputed the loss of the back letter to a fire which had taken place in his premises on 29th

December 1911, and which had destroyed some of his other papers—a fire which, for all that appears, may have been caused by the pursuer's own negligence. It is not averred that he asked M'Avoy to make a search for the document and that the latter did so. The pursuer does not explain how M'Avoy came to find the paper in or about September 1921, though it may be conjectured that he found it because he was then for the first time asked by the pursuer to search for it. The pursuer avers that M'Avoy's failure to discover the back letter earlier was due to the fact that the backing on the letter erroneously states that the letter was granted by M'Avoy in favour of the pursuer, and that the letter had been retained by M'Avoy in the belief that it referred to some dealings between him and the pursuer. This explanation is double-edged, because it emphasises the pursuer's negligence in not taking precautions to obviate such a contingency and in not making sure that all his papers had been returned to him by their temporary custodian. The pursuer does not aver that he made inquiries at any time of the firm of solicitors who prepared the document. For all that appears that firm may have had in its possession the draft of the document or other adminicles, which would have enabled the pursuer to prove its tenor if he had wished to do so. That, however, was not the pursuer's attitude. In article 10 of the condescendence in the former action he averred that he had "unfortunately lost" his back letter, but he added that he maintained that "no such letter of acknowledgment was necessary to safeguard his ownership." In other words, he deliberately elected to take his chance of winning his case without the help of the back letter. That consideration alone would in my judgment make it inequitable for him to ask that the case should be reopened after it had been tried and decided upon the lines which he himself had accepted as not unfair to him in the circumstances. I arrive at the same result on a consideration of the pursuer's own account of the causes which led to the temporary loss of his back letter. While it would be unfair to charge him with having shown a culpable disregard of his own interests or with having acted in a manner which was unnatural in a man of his position, it is none the less true that if he had appreciated the importance of the document and had taken ordinary and reasonable precautions for its preservation it would not have been mislaid but would have been available for production in the former action. No precedent was cited to us where the principle conveniently embodied in the words *res noviter* or *instrumentum noviter repertum* was applied in circumstances even remotely resembling these of the present case. I refer merely by way of illustration to the authorities cited by Lord Mure in his opinion in the *Phosphate Sewage Company v. Lawson & Sons' Trustee* (1878, 5 R. 1125, at p. 1145), and also to the cases of *Barbour v. M'Gauchie* (1828, 7 S. 18), *Byres v. Forbes* (1866, 4 Macph. 388), and *Campbell v. Campbell* (1865, 3 Macph. 501, Lord President

M'Neill, at p. 504). I do not in this connection attach importance to two cases which were cited to us and which illustrate the way in which this Court has thought fit to exercise the discretion committed to it by section 72 of the Court of Session Act 1868 in regard to allowing further proof in appeals from the Sheriff Court, viz., *Coul v. Ayr County Council*, 1909 S.C. 422, and *Gairdiner v. Macarthur*, 1915 S.C. 589. The case of *Reid v. Haldane's Trustees* (18 R. 744) was also founded on by the pursuer's counsel. The Court there, on a reclaiming note, allowed a plan to be lodged and proof to be led in regard to it, and afterwards recalled an interlocutor by which the Lord Ordinary after a proof had assoilzied the defenders. While the Court in dealing with reclaiming notes scrutinises somewhat strictly applications for permission to lead additional evidence, it cannot seriously be suggested that the Court proceeds, or ought to proceed, with the same strictness as where relief is asked for against a *res judicata* or against some interlocutor or verdict which is declared to be final by statute or Act of Sederunt unless *res noviter* is averred and proved—see *Lowenfield v. Howat*, 1891, 19 R. 128.

If the foregoing observations are well founded, the Lord Ordinary's interlocutor ought to be affirmed, though upon grounds somewhat different from those upon which he rested his judgment. In order to avoid any misconception I may explain that I have not considered a point raised by the defenders in their pleadings but not supported in argument, viz., that if the pursuer had any remedy it was by way of appeal to the House of Lords, and that he lost this remedy by allowing his appeal to be dismissed when he was refused permission to prosecute it *in forma pauperis*.

While it is unnecessary to express a definite opinion on the point my present impression is that if the pursuer had been able to allege a satisfactory reason for not having produced his back letter at the proper time, the existence of the document must have been regarded as a fact of such materiality as to entitle him to have the original dispute reopened and retried. If the back letter had been before the Court at the proof in the former action, can it be doubted that, in the words of Lord Cairns (previously quoted), it would have "been sufficient to have changed the whole aspect of the case," assuming of course that the pursuer could prove that the signature was that of M'Kinstery? Indeed, in view of the defenders' pleadings both in the former and in the present action it is not easy to see how the existence of a signed back letter addressed to the pursuer by the defender M'Kinstery, and in the lawful possession of the pursuer, could be reconciled with the line of defence to which the defenders are committed.

LORD CULLEN—I concur in the opinion of the Lord President.

LORD SANDS—In this case the pursuer seeks reduction of a decree of this Court upon the ground that it proceeded upon

false evidence on the part of the defenders which he proposes to vouch by production of a document of the existence of which he did not know at the date of the trial. When the case was before the Lord Ordinary the pursuer relied upon an averment of conspiracy between the two defenders to mislead the Court by a concocted story in the evidence at the previous trial. There can, I think, be no doubt that proof of subornation or of conspiracy to procure or to give false evidence might be a ground of reduction of a decree of Court. The difficulty, however, which faces the pursuer in this case is, as pointed out by the Lord Ordinary, that he does not aver facts and circumstances which will go to prove conspiracy extrinsic to the falsity of the evidence which the defenders are alleged to have given. It would open a very wide door to the re-trial of cases if inferential conspiracy, in view of the alleged concurrent falsity of testimony, were to be regarded as a relevant ground for allowing a new inquiry.

This region of the law is, however, one in which, as I shall have occasion again to point out, it is dangerous to lay down universal propositions, and I can conceive of a case where it would be unnecessary to aver any fact extrinsic to the falsity of the testimony in order to make a relevant charge of conspiracy. Two party litigants making common cause in a litigation might rely upon their evidence as to something that passed between them in a certain cellar on the night of the air raid in Edinburgh. If it could subsequently be shown that one of these parties was in London and the other in Belfast on the night of the Edinburgh air raid, I hardly think that it would be necessary to prove any extrinsic fact to make good a charge of conspiracy to deceive the Court by false evidence. There is nothing, however, so far as regards conspiracy of this short and sharp character in the present case. I doubt the relevancy of a charge of conspiracy where the relevancy depends upon a careful examination of all the evidence in the previous trial in order to ascertain whether if in certain particulars that evidence was false an inference of collusion is to be conclusively preferred to one of independent falsehood.

Pressed by these considerations the pursuer has now somewhat shifted his ground. Without abandoning his plea of conspiracy he relies upon his new plea of *res noviter*. It would not do justice to this plea, however, to dissociate it from the averment of fraud. There may be a plea of *res noviter* in a case in which there is no suggestion of falsehood, or at all events of falsehood having any direct relation to the subject-matter of the *res noviter*. This is not such a case. The alleged *res noviter* and the charge of misleading the Court by false testimony are not dissociated. They must be taken together.

In dealing with the case as one of a demand for a re-trial on the ground of the discovery of new evidence showing the falsity of the evidence of the defenders at the previous trial, the Lord Ordinary relies upon the case of *Mackintosh's Trustee v.*

Stewart's Trustees (8 F. 467), where such a demand was disallowed. It was suggested in the course of the argument that the judgment in the case of *Mackintosh's Trustee* is one which might be reconsidered by a more authoritative Court. In my view there are no grounds for this suggestion. The soundness of the judgment as applied to the facts of that case, as it humbly appears to me, is incontestable, and the reasons assigned are sound as general propositions. Nevertheless I humbly think that certain propositions there advanced though sound generally are stated too absolutely, and more absolutely than was necessary for the determination of the particular case. I refer in particular to the statement by Lord Kinnear that where a final judgment is sought to be set aside on the ground of fraud (and therein must of course be included subornation, conspiracy, and perjury) the alleged fraud must be capable of being tried as a separate issue—that no re-trial of the original question must be involved. The decree must first be set aside to open up a way for such re-trial. It appears to me that this is too absolute—that in certain cases the two things are inseparable. There was a criminal case recently in England where the charge was forgery of a will. The conclusive evidence, so far as I recollect, was the discovery of a draft of the will in the handwriting of one of the accused, and attempts to imitate the testator's signature in documents shown to be of later date than the testator's death. Now if this will had been sustained as genuine by a judgment which had become final, I have no doubt that the decree would have been set aside on the evidence which came out at the criminal trial. But this would necessarily have involved the re-trial of the very question tried before, viz., whether the will was genuine or a forgery. Another case which may be figured is that of the discovery, after a will challenged as a forgery has been sustained, of conclusive evidence that one of the alleged instrumentary witnesses died several years before the date of the alleged will. I can hardly doubt but that the law would allow redress in such a case, yet the issue would be virtually the same as in the previous action—"Is this document genuine or a forgery?"

But accepting as I am bound to do the doctrine of the case of *Mackintosh's Trustee* that the alleged discovery of new evidence contradicting the evidence of a party to the cause upon which the Court relied at the previous trial is not apart from averments of subornation a relevant ground of reduction of a decree, I proceed to consider the question (which in the illustrations already given I have assumed in the negative) whether this is a rule of universal application. In old times great latitude appears to have been allowed in the opening up of cases already adjudicated upon, upon the ground of the discovery or emergence of new facts and circumstances placing a new light upon the matter. When the new evidence was not available at the date of trial and could not then have been discovered with reasonable diligence, this latitude in

allowing new inquiry may seem to have been consonant with abstract justice, and Erskine thought so. But in modern practice this consideration has been obliged to yield somewhat in the range of its application to cogent considerations of convenience. In old days protracted and renewed litigation was regarded as an almost inevitable incident of rights of property and claims to such rights. When every stick of furniture had been sold and every acre had been set in wadset a "guid gangin process" was still a family asset. The modern view is entirely different. Doubtful rights and protracted or renewed litigation are regarded as grave evils, and the utmost importance is attached to the finality of decrees of Court after deliberate trial of the issue. Further, if decrees were to be allowed readily to be opened up on the ground of the discovery of new evidence, it might not be difficult to obtain new trials upon averments which eventually were not sustained, or if sustained were given a colour at the second trial which showed that they were not material.

For these reasons the general rule enunciated in the case of *Lockyer v. Ferryman* (3 R. 882, *affd.* 4 R. (H.L.) 32) and *Mackintosh's Trustee*, has been firmly established. But is this rule of universal application? I think not. As it appears to me there may be cases where to apply it would impinge on an intolerable extent upon the principle that the Court will give redress against fraud. This case I think can best be made clear by way of illustration. The validity of a marriage may depend upon the authenticity of a document said to have been executed upon a certain day in Edinburgh. The pursuer swears to the execution of the document. The defender denies his signature. The Court prefers the evidence of the pursuer and pronounces decree of declarator of marriage. Subsequently it is ascertained, and is conclusively vouched by documentary evidence, that at the date of the alleged marriage the pursuer was engaged as a nurse in a London Hospital and was in London that day, whereas she had deposed that at that time she was resident with her mother in Edinburgh. The pursuer might be prosecuted and convicted of both perjury and forgery. The civil decree would be no answer to that. But if civil proceedings were taken for reduction of the decree of declarator of marriage would the Court refuse to allow the question to be opened up? I think not. Perhaps, however, the matter can best be illustrated by way of contrast. A civil case turns upon whether the pursuer was present at a meeting in Edinburgh upon a certain day. Several witnesses depone that he was; others to the contrary. The Court prefers the evidence of the pursuer. Subsequently the defender seeks to have the judgment set aside on the ground that he has discovered two more parties who were at the meeting and who are prepared to swear that the pursuer was not at the meeting. Such an averment would not be sustained as warranting a reopening of the matter. But on the other hand the defender might aver that he had now

ascertained that on the date of the meeting the pursuer was undergoing a sentence of imprisonment in Ireland, and that, as the books of the prison conclusively showed, he was an inmate of Dublin jail on the date in question. In my view, upon such an averment the Court would allow the matter to be reopened.

Illustrations are easy, but it is extremely difficult, perhaps impossible, to formulate any rule of discrimination, just as it is hard to formulate any rule as to the degree of irregularity in an arbitration which will warrant the Court in setting aside an award on the ground that the conduct of the arbiter was contrary to the essential principles of justice. Perhaps a rough test—as good as any rough test that can be suggested—is whether the new facts averred, if proved, would warrant the submission by the Court of the circumstances to the public prosecutor with a view to the consideration of a prosecution for perjury. I shrink from the suggestion that a party might be convicted of perjury in respect of the evidence by which he obtained a decree and yet this Court find itself unable to give any redress against the decree. The test suggested is, however, a very rough one, and the matter requires closer scrutiny.

Without attempting to formulate any rule I shall venture to indicate certain considerations which appear to me to be important in considering whether the circumstances are such as to constitute an exception to the general rule recognised in *Mackintosh's Trustee*, and I shall do so in the light of their bearing upon the present case.

1. The alleged *res noviter* must be evidence of crucial importance in relation to the case. It must not be a mere item or make-weight of additional evidence, or a contradiction of some detail in the evidence that was accepted. I say crucial, but I do not go so far as to affirm that it must in every case be by itself necessarily decisive of the original issue. In the present case the importation into the evidence of the document said to have been discovered would give an entirely new aspect to the case. I understand that the leading opinion in the former case put the matter even more strongly. That opinion is not binding upon the Court in any subsequent proceedings or even upon the learned Judge who gave expression to it, but in the light of it I think it impossible to affirm that the document is not one of crucial importance.

2. The new averment must be of something sharp, definite, and capable of decisive determination, not an averment of an inference to be drawn from a number of disconnected new discoveries. It appears to me that the alleged *res noviter* in this case satisfies this condition. The pursuer produces a document bearing to be signed by one of the defenders which has *prima facie* the appearance of authenticity.

3. Whilst it cannot be laid down as an absolute rule either that the new evidence must be documentary or that the discovery of any new document which might affect the issue is conclusive, the law of Scotland

attaches special importance and value to writings in this relation. This consideration is satisfied in the present case, for the *res noviter* is the discovery of a writing.

4. It is an important consideration that the alleged new fact, if proved, brings home fraud or falsehood to the other party. When no such consideration is involved it is much easier to treat a litigation as a game. The game was fairly played, you lost, and you are not entitled to demand a re-play because you had mislaid your mashie which you have now found. Considerations quite alien to those of the laws of the game are imported when questions of falsehood and fraud are involved. This consideration also is satisfied in the present case, for, as I have already stated, the pursuer associates his plea of *res noviter* with a charge of fraud, and if the facts averred be proved, it seems difficult to reach any conclusion other than that the association is warranted.

Among the considerations which I have enumerated one is omitted which may perhaps be regarded as the most important of all, viz., that the new fact is one which the party desiring to found upon it not only did not know but could not by reasonable diligence have ascertained at the date of the former trial.

I have difficulty in formulating this rule in a manner satisfactory to my own mind as covering all cases even where charges of fraud are involved. I am unable to recognise it as a rule of law that the possibility or even the probability that evidence would have been timeously discovered by due diligence is in every case an absolute bar to reopening the matter. The rule is an equitable one, and a measure of discrimination must, I think, be allowed in its exercise in certain cases where fraud is in issue. I figure, for example, the case of a litigant who has succeeded upon his denial that a document alleged to have been signed by himself had ever been so signed. The document is subsequently found with his signature thereon—it may be duly witnessed and tested. In these circumstances it would not, as it appears to me, be possible to accede to the contention on his part—"With a sufficiently careful search you might have discovered this document before the trial. It was found after solemn trial in accordance with my oath and in the face of your oath to the contrary that no such document was executed by me, and therefore it would be inequitable to allow you, now that it has turned up, to produce and found upon it. Your negligence outweighs my falsehood. My penalty may be a conviction for perjury, but equity requires that the civil decree shall stand."

But even upon the assumption that negligence in not finding a document timeously, or recklessness in taking proceedings without waiting for it to turn up, were in all circumstances an absolute bar to reopening the matter, I hesitate to affirm that pursuer's averments involve such a case. There were two keenly contested litigations in the course of which the production of the document would have been of great importance

to the pursuer. This as it appears to me goes far to negative the idea of any wilful carelessness. But this consideration is not conclusive. There may be an honest belief in the destruction or the irretrievable loss of a document without any reasonable grounds for such a belief. But on the pursuer's averments in the present case I think that he may succeed in showing that he had reasonable grounds to believe in the destruction of the document. The question, it must be observed, is not whether the pursuer was guilty of carelessness in losing the document, but whether he was guilty of carelessness in not finding it timeously. It has happened occasionally, I believe, in the experience of some people who are not methodical that they have lost a document, and satisfied themselves quite reasonably after careful search not only that it was destroyed but how it must have been destroyed, and yet the document has turned up after all. A dividend warrant, about which a formal declaration has been made that it was inadvertently destroyed and an indemnity upon a sixpenny stamp has been granted, has been known to have been found in the third volume of Brown's Supplement. No search would ever have discovered that dividend warrant except a search for a case reported by Fountainhall.

Without, however, relying exclusively upon the considerations above adverted to in relation to fraud, or upon the special averments of the non-timeous production in the present case, I am content to take it that when, as in the present case, the document raises a direct issue of fraud, and no prejudice or loss of other evidence is alleged as having been occasioned by the delay, a less exacting standard of diligence will satisfy the requirements of the law than might otherwise be insisted on.

In my opinion the pursuer's averments set forth a *prima facie* case of miscarriage of justice induced by falsehood of the defenders; this case is *prima facie* instructed by production of the document founded upon; and for the reasons I have stated I do not find grounds of law which forbid the Court to allow the inquiry demanded.

I am accordingly of opinion that the interlocutor of the Lord Ordinary should be recalled and the case be remitted to him to allow parties a proof before answer of their averments.

The Court recalled the interlocutor of the Lord Ordinary, allowed parties a proof of their respective averments on record, and remitted to the Lord Ordinary to take the proof, and to proceed.

Counsel for the Pursuer—Morton, K.C.—Scott—W. A. Murray. Agents—Bowie & Pinkerton, S.S.C.

Counsel for the Defender James M'Kinstery—Macphail, K.C.—Garson. Agents—Balfour & Manson, S.S.C.

Counsel for the Defender Dugald Blackwood—M'Laren, K.C.—Ingram—MacLean. Agents—W. C. Leechman & Company, Solicitors.

Tuesday, February 19.

SECOND DIVISION.

[Sheriff Court of Lanarkshire
at Hamilton.]

HUTCHISON v. CADZOW COAL COMPANY, LIMITED.

Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule (3) and (16)—Partial Incapacity—Award of Compensation—Workman Subsequently Earning Wages at a Rate Exceeding Average Weekly Earnings Prior to the Accident—Suspension of Compensation—Unemployment during Period of Miners' Strike—Application for Review.

Workmen's Compensation Act 1906—Procedure—Application for Review—Preliminary Defences—Relevancy.

A miner sustained injuries owing to an accident in the course of his employment, and was awarded compensation in respect of partial incapacity. He subsequently obtained work with the same employers at an increased wage, and the payment of compensation was suspended. During the miners' strike his employers' colliery was not working, and consequently he was unemployed, while at the same time he remained partially incapacitated. In an application at his instance for review of the award suspending compensation in which he averred that he had been deprived of his employment, a plea to relevancy was sustained by the arbitrator on the ground that the application was lacking in precision, and disclosed no change of circumstances entitling him to review. *Held*, on appeal, that the claimant had sufficiently averred a change of circumstances entitling him to inquiry.

Observations per Curiam as to the circumstances in which discussions on relevancy should be allowed in applications under the Act.

James Hutchison, coal miner, 170 Low Waters, Hamilton, *appellant*, being dissatisfied with a decision of the Sheriff-Substitute at Hamilton (HAY SHENNAN) in an arbitration under the Workmen's Compensation Act 1906 between him and the Cadzow Coal Company, Limited, coalmasters, Cadzow Colliery, Hamilton, *respondents*, appealed by way of Stated Case.

The Case stated—"This is an arbitration in an application presented on 28th September 1923 by the appellant for review of an award of compensation. On 28th May 1908 the appellant received injuries necessitating the amputation of his left leg by accident arising out of and in the course of his employment with the respondents. The respondents admitted liability and paid him compensation in respect of said injuries. On 30th December 1910, in proceedings initiated by the respondents, the rate of 16s. per week was fixed in respect of the appellant's partial incapacity. On 28th September 1917 the respondents again raised