Mr. Anderson.—I do not know whether your Lordships will make any declaration in the remit to guide the Court of Session. The proceedings are very peculiar. The first is an advocation of two briefs—competing briefs. The respondent has been served. That is now reversed; but if your Lordships' judgment is right, or if the Court of Session hold that, according to Scotch law, the same results would follow, then the appellant, who is the son and heir-at-law of the original appellant, will be declared entitled to be served in the advocation.

Lord Advocate.—It is impossible to do so in the shape in which the case stands.

LORD CRANWORTH.—The Court of Session will know best how to proceed. There can be no possible mistake about it. The case was argued upon the assumption that it was to be remitted back to the Court, and we must take care that we do not run the risk of doing something which we do not intend.

Mr. Anderson.—We were found liable in costs below, and we have paid them, shall we get them back?

LORD CRANWORTH.—You must get back any costs you have wrongly paid.

LORD CHELMSFORD.—I suppose, Lord Advocate, that follows as a matter of course?

Lord Advocate.—Yes, my Lord.

Mr. Anderson.—It is always an order in your Lordship's judgment.

LORD CRANWORTH.—Sir John Lefevre will take care that that is made quite clear.

Interlocutors reversed. Cause remitted with direction as to repayment of costs.

Appellants' Agent, William Waddell, W.S.—*Respondent's Agent*, James Somerville, S.S.C.

JULY 15, 1859.

JOHN KIRKLAND & SON, &c., *Appellants*, *v.* NISBET & COMPANY, *Respondents*.

Proof—Correspondence—Witness's construction of document—Parole.—*At a jury trial in a question as to the extent of an order for goods given by the defenders to the pursuers, which mainly depended on the construction of correspondence, a witness was asked what an employer "would be entitled to expect" on receipt of a particular letter in the correspondence. The defenders claimed that they were entitled to put the question, so as to prove that no mercantile usage qualified the clear terms of the letter, seeing that the pursuers had averred and founded on such usage.*

HELD (affirming judgment), *That the question was incompetent,* 1. *Because it was not so put as to relate to mercantile usage, but really asked the witness to construe the writ, which was the province of the Court and jury; and,* 2. *Because it was asking the witness to construe an isolated letter without shewing him the whole correspondence.*[1]

The defenders appealed to the House of Lords, maintaining (in their *printed case*) that the judgment of the Court of Session should be reversed:—"1. Because the said question to the witness Kaeracouse was a competent question, and ought not to have been disallowed by the Lord President at the trial. 2. Because the exception taken to the ruling of the Lord President disallowing the said question, ought to have been sustained." *Smith* v. *Wilson*, 3 B. & Ad. 728; *Shore* v. *Wilson*, 9 Cl. & F. 355.

The respondents supported the judgment, maintaining (in their *printed case*):—"1. As a general rule, the construction of written documents is for the Court, and there was nothing in the case to take it out of that rule, or to entitle the appellant to put the question which was objected to. 2. The question was irrelevant to the issue. 3. Having regard to the terms of the question, and the circumstances under which, and the time when it was put to the witness, it was unintelligible and inadmissible." *Calder* v. *Aitchison* 5 W.S. 40.

Lord Advocate Moncreiff, and *Rolt* Q.C., for the appellants. The question was competent. We wanted to prove that 600 tons of the sugar had been actually sold to us by the respondents, and that this was the meaning of the word "contracted" in the letter of 11th Dec. 1850. We produced a witness to prove the mercantile usage, and asked him that question.

[LORD CHANCELLOR.—If you had asked the witness about the mercantile usage, that might have been well, but how could you ask him such a question as this: "What would the employer be entitled to expect from that letter?" That was asking the witness to explain or construe a written document. It was asking him the meaning of the document.]

[1] See previous reports 21 D. 1; 31 Sc. Jur. 3. S. C. 3 Macq. Ap. 796: 31 Sc. Jur. 641.

What we wanted was merely to explain the technical meaning of the word "contracted."
[LORD CHANCELLOR.—But you must defend the question as put. The question was in substance—What is the meaning or just construction of the whole letter?]
[LORD CHELMSFORD.—What a witness in such cases is called on to do is merely to explain some technical terms to assist the Court, and the Court then construes the document. You might have asked the witness what was the technical meaning of the word "contracted," if it had any peculiar meaning. But you ask him the meaning of the whole written contract. You are not to use the witness as an interpreter, but only as a guide.]
[LORD CHANCELLOR. You are not to substitute the witness for the Judge.]
We can carry the argument no further.
Anderson, Q.C., for the respondents, was not called upon.
LORD CHANCELLOR CAMPBELL.—My Lords, I think that this question was very properly overruled by the learned Judge, because, in effect, it sought to obtain the opinion of the witness on the construction of a written document. There is no doubt that evidence may be competently given of mercantile usage to explain the meaning of peculiar terms used in trade. But—What is the meaning of a written document? is not a question proper to be put to a witness. The question here put was substantially this, What was the contract—what is the construction of the document? That was an improper question; and I have no difficulty in recommending your Lordships to affirm the unanimous judgment of the learned Judges in Scotland which overruled it.
LORDS BROUGHAM, CRANWORTH, and CHELMSFORD concurred.

Interlocutor affirmed, with costs.

Appellants' Agents, Gibson-Craig, Dalziel, and Brodie, W.S.—*Respondents' Agents*, Campbell and Smith, W.S.

JULY 22, 1859.

Mrs. HONYMAN GILLESPIE and Husband, *Appellants*, *v.* JAMES RUSSELL and Son, *Respondents*. *Et è contra.*

Res Judicata — Process — Contract — Concealment — Medium concludendi—Irrelevancy—*An action to reduce an agreement was met by pleas of irrelevancy, and the Court assoilzied from the conclusions of the action "as laid." A second action was then raised on the same facts, between the same parties, with substantially the same petitory conclusions. The allegations were, however, more specific and relevant, setting forth fraudulent concealment and fraud.*
HELD (affirming judgment), *The first interlocutor was not* res judicata *as it did not profess to decide the merits.*[1]

This was an action of reduction of a lease of minerals, granted by Mrs. Gillespie to the defenders, for the period of 25 years from Candlemas 1850, of coal, ironstone, limestone, and fireclay, (but not to include any other minerals whatsoever,) in the lands of Torbanehill. There were already two actions in Court in relation to this lease. The first was for the purpose of having it declared, that a certain mineral, which had been extensively worked by the defenders in the said lands, and sold for the production of gas, did not fall under the category of *coal*, or of any other of the minerals specified in the lease, and for damages accordingly. That action was settled in favour of the defenders, by the verdict of a jury, in August 1853.
Immediately after that judgment the pursuers raised a second action, concluding for reduction of the said missive of lease, "at least in so far as it includes, or can be held to include, the foresaid valuable mineral substance, of an argillaceous or other nature," &c.; and for payment of £50,000, or such other sum as should be found to be the value of the gas coal, being the gas coal now again brought in question, put out, worked, and sold by the defenders from the pursuers' lands, and for an accounting to ascertain the amount. In that action they averred, that the defenders had proposed to them to enter into the lease in question, they (the defenders) being at that time tenants of the adjoining lands of Boghead, where they had found the valuable mineral forming the subject of dispute, of which they had got an analysis from an eminent chemist, by which they had ascertained its great value for the production of gas. They pleaded, (1.) fraudulent misrepresentation and concealment; and, (2.) error *in essentialibus.*
In that action the Lord Ordinary, on 10th July 1855, found that the pursuers had not averred

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[1] See previous reports 17 D. 1; 18 D. 677; 19 D. 897; 28 Sc. Jur. 242; 29 Sc. Jur. 415. S. C. 3 Macq. Ap. 757: 31 Sc. Jur. 641.