to prevent that case being relied upon for purposes to which it is certainly inapplicable, I cannot help thinking it worth while to take notice of what was supposed to be the ground of the decision of that case, whether right or wrong. I would not say that the decision of this House ought to be regarded as being possibly wrong—I mean, what it was upon which the decision probably proceeded.

The House, I suppose, considered that every entry upon a register ought to have reference to a title; that the antecedent title there was shown to be anonymous — not to be Dr Andrew Buchanan's; and probably the House may have thought that there would be so much confusion and uncertainty and misconception as to the effect of the register in the mode of registration adopted as to make it unsafe to suppose that the registration could be attributed to any other title than that which was actually produced, that being a title not extending to Dr Andrew Buchanan. That I have always supposed must have been the ground of the decision—that the House did not think that there was any transfer intended, and that they did not think—in fact they could not possibly think on the facts before them—that the original contract was made by or on behalf of Dr Andrew Buchanan. Under these circumstances the House seems to have disregarded the registry altogether, although it was perfectly well known to Dr Andrew Buchanan, and acted upon by him, because they could not connect it with the antecedent title.

Lord Blackburn—My Lords, I am entirely of the same opinion. I take it that under the Act of 1862, when a name is entered upon the register, a person entitled as a shareholder is *prima facie*, —until the contrary is proved—to be taken as a shareholder. Section 23 of the same Act says that "every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company." The question therefore comes to be, whether it is shown that Mr Cuninghame (the appellant in this case) had agreed to become a member of this company. In the case of *Lumsden* v. *Buchanan*, as I understand the facts to have been there, the House of Lords—although there is scarcely a word said in their judgment about the case of Dr Andrew Buchanan—seem to have come to the conclusion that he was not shown, as a matter of fact, to have intended to become a shareholder. If so, that may have been quite right on the facts of the case, or it may even have been a mistake upon the facts of that case, but it does not govern another case where the facts are quite different.

Here Mr Cuninghame agreed to become a shareholder in every way in which any man can agree. He under his own hand authorised the buying of the shares in his name by his agent, who had authority to act on his behalf; he caused the documents to be drawn up in such a way that the shares would be transferred into his name by his agent. Again, he wrote to the company saying that only three, which was a quorum, had signed the transfer, and asking them, though not in these precise words, to register the names of the five trustees, inasmuch as a quorum had signed. Immediately after that, he with his own hand wrote a letter saying that the shares were now standing in his name and asking that the dividend upon them should be paid in a certain way. Stronger evidence that he directed his name to be entered upon the register and agreed to be a shareholder I cannot conceive. If the learned counsel for the appellant had been able to show that there was any principle of the law of Scotland, or of the general law, which said that a man cannot be held to have become a shareholder in a company without signing his name to a transfer, that would have been another affair; but there is no pretence for saying that there is any such rule of law; and I think that the terms of the 38th section of the articles of the City of Glasgow Bank do not mean that. Even if they did, I do not think it would lie in the mouth of anyone, after the transfer had been made and had been acted upon for some time, and after the creditors had had an opportunity of seeing it, to say that it should have the effect of controlling the Act of Parliament.

Lord Gordon concurred.

Lord Chancellor—I am obliged to my noble and learned friend for pointing out that in speaking of the transfer in this case I used the expression "sealed" as applied to those who were parties to it as transferees. I ought to have used the expression "signed." If the document had been intended to be sealed (which I see it was not), even then the absence of the seal, I think, would have placed it in just the same position as the absence of a signature. As it is, the observations I made apply to the absence of an actual signature or two signatures.

Interlocutor appealed against affirmed, and appeal dismissed with costs.

Counsel for the Appellant—Herschell, Q.C.—Chitty, Q.C. Agent—William Robertson, Solicitor.

Counsel for Trustees who signed Transfer—Lord Advocate (Watson), Q.C.—Pearson, Q.C. Agent—Preston Karslake, Solicitor.

Counsel for the Respondents—Kay, Q.C.—Benjamin, Q.C.—Davey, Q.C.—Asher. Agents—Martin & Leslie, Solicitors.

Tuesday, July 8.

PHOSPHATE SEWAGE COMPANY (LIMITED) *v.* MOLLESON (PETER LAWSON & SON'S TRUSTEE).

(Before the Lord Chancellor (Cairns), Lord Hatherley, Lord Blackburn, and Lord Gordon.)

(In Court of Session July 5, 1878, *ante*, vol. xv. p. 666, 5 R. 1125.)

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

Averments in two successive claims in a sequestration in consequence of which—*affirming* judgment of Court of Session—the

plea of *res judicata* was sustained, the *medium concludendi* in the second being similar to that in the first, and the only distinction being that certain new allegations were made which were part of the proof of the fraud founded on in order to the reduction of the contract libelled, and which were likewise in the knowledge of the claimants at the time when their claim was originally stated.

The Phosphate Sewage Company (Limited) lodged a claim with Mr Molleson, the trustee upon the sequestrated estate of Peter Lawson & Son, which the latter rejected, and on appeal his deliverance was confirmed after proof by the Court of Session and by the House of Lords. Shortly after the claim had been lodged the claimants instituted a suit in the English Court of Chancery in order that the same question, which was one of alleged fraud on the part of the bankrupts, might be tried. The Vice-Chancellor, and on appeal the High Court of Justice, "ordered that the plaintiff company be at liberty to prove under the sequestrated estates." The plaintiff then lodged a new claim with the trustee in the sequestration, founding upon what he alleged was *res noviter veniens ad notitiam* with regard to the fraud, and also upon the Chancery decree. The trustee again rejected the claim, and on appeal his deliverance was affirmed by the Lord Ordinary and the First Division of the Court of Session, July 5, 1878, 5 R. 1125, 15 Scot. Law Rep. 666.

The Phosphate Sewage Company appealed to the House of Lords.

At delivering judgment—

Lord Chancellor—My Lords, this case has been argued before your Lordships with great force and ability by the learned counsel for the appellants and the respondent, but in the view which I take of it, it will not be necessary that I should go at any great length into many of the questions which have been brought before your Lordships. With regard to the point which really was to be determined, the narrative of the facts seems to me to lie in a very small compass.

My Lords, in the year 1873, there being at that time a sequestration of the firm of Lawson & Sons in Edinburgh, a claim was made by a person who represented the Phosphate Sewage Company, who are the present appellants, to prove under the sequestration for a particular debt. The character of that debt he described in the document which was the origin of the claim. He described it in this way—He said there was due and owing a very large sum (£70,000 and upwards) by the bankrupts to the Phosphate Sewage Company "under the circumstances set forth at length in the bill of complaint in Chancery" (that is, in the Chancery of England) "filed on the 19th of April 1873, between certain persons as there mentioned," and as concluded for under the first item of the prayer of the said bill of complaint, a printed copy of which bill is signed by the deponent, "and is herewith produced and held as repeated *brevitatis causa*"—that is to say, his case was—"I have filed a bill in the Court of Chancery in England, and I have described in that bill the circumstances under which I claim this debt against the estate under sequestration, and I hand in the bill as a narrative of the facts on which my claim is founded."

My Lords, the trustee under the sequestration refused to admit the claim, an appeal was made from the trustee's decision to the Court of Session in the ordinary way, pleadings were ordered, and there was a condescendence and answers. The condescendence again referred in terms to the bill of complaint which was then pending in the Court of Chancery in England, and repeated the allegations contained in that bill of complaint—that bill of complaint having been filed as I have stated on the 19th of April 1873. The case upon that condescendence and upon those facts came before the Lord Ordinary and the Court of Session in Scotland, and ultimately came before your Lordships' House. The result of the decision was that the Phosphate Sewage Company were held not to have proved, and not to be entitled to prove, the debt which they claimed against the estate under sequestration. That is *res judicata* upon those facts and upon those materials to which I have referred, and there is no question that it cannot now in any way be set aside. That decision stands as perfect and complete law.

Then the bill of complaint which was pending as I have stated in the Court of Chancery in England went on in the ordinary course of Chancery litigation in this country. The bill was amended in a manner which I shall afterwards mention, and it came on for hearing in the Court of Chancery, and a decree was made by the primary Judge, and affirmed by the Court of Appeal, declaring that the Phosphate Company were entitled against all parties to that litigation to relief and to be paid a large sum of money. One of the parties to that litigation was the trustee of this sequestrated estate—of course against him there could be no order that he should pay any money, for he was not personally liable, and against the sequestrated estate there could be no order, because it was not within the jurisdiction or under the administration of the Court of Chancery in England. But a declaration was made—I will not stop to consider whether it was entirely in accordance with international comity or not—that the plaintiffs in that suit, the Phosphate Company, should be entitled to go and prove in the sequestration suit in Scotland against the estate of the Lawsons for the sum in question. That having been done, the Phosphate Company again applied in Scotland to the trustee.

My Lords, I have mentioned this suit in the Court of Chancery in England, but it really appears to me that the case need not be embarrassed with any question as to a foreign judgment or the validity or the examinability of a foreign judgment. When I find an application again made to the trustee in Scotland, it seems to me that it is just as if the application had been made *de novo* in the sequestration in Scotland without there having been in the meantime any judgment in a Court of England at all, and that the application in Scotland must be judged of just as if a fresh proceeding or a fresh suit had been instituted in Scotland.

Now, what was the fresh proceeding and what was the fresh application in Scotland? The Phosphate Company again applied to the trustee and again applied upon a document which was the foundation of the claim, and this time the Phosphate Company in its document of claim said—"We apply by virtue of a decree, and for

payment of the sum mentioned in a decree of the Court of Chancery in England." The trustee refused the claim, and as before the question came before the Lord Ordinary and the Court of Session, and as before a condescendence was ordered and a pleading upon both sides. At the outset, when the condescendence is looked at, you find the Phosphate Company again put their claim upon the allegations contained in the bill filed in the Court of Chancery in England, but this time in place of saying that they claim upon the allegations of the bill filed in the Court of Chancery in England on the 19th of April 1873, they say they claim on the allegations of that bill as thirdly amended on the 3d of March of 1874.

Of course if they had claimed on the allegations contained in the bill filed on the 19th of April 1873 there would have been nothing to argue; the case would have been absurd, and at once out of Court. The only colour upon which the second action in Scotland can be supported is, whatever difference there may be found to be between the allegations in the bill filed originally on the 19th of April 1873 and the bill as amended on the 3d of March 1874. If there is no difference, then the case is just as hopeless as if it had been launched upon a repetition of the allegations in the original bill. If there is a difference, we must ascertain firstly what that difference is, and whether it will afford a ground for a new action without the bar of *res judicata* being pleadable, and secondly, whether this new and different matter was matter which was in the knowledge of the Phosphate Sewage Company at the time when the first suit was disposed of.

Now, my Lords, what is the difference? The difference appears in certain red-ink alterations which represent the ultimate amendments of the bill in Chancery. I need not go through them in detail, because it is admitted that among those red-ink alterations there is only one that has any bearing at all upon the case, or assumes the appearance of a new ingredient in the case, and that is an allegation that of the purchase-money mentioned in the bill as it originally stood, and the repetition of which was sought, namely, £65,000, while £50,000 was to be paid to Hartmont, Lawson & Son, and Ogle in certain shares, they agreed between themselves that £15,000 should be paid to the defendants Engelbach and Keir. It is said now that that was a circumstance which gave a still more fraudulent character to the transaction than it originally possessed, and that that is a material difference between the original statements and the statements by amendment.

I must, however, stop here for the purpose of observing that when I turn to the prayer of the bill after its amendment, I find that in that prayer as amended, ranging over ten paragraphs, there is no alteration whatever except in the first paragraph, and it was upon the conclusions of the first paragraph that the claim in the original suit in Scotland was founded.

Now, my Lords, what is the alteration which is made in the first paragraph of the prayer? There is no alteration whatever as regards the claim that the estate of Lawson & Sons and the other persons mentioned should be held liable to repay the £65,000 and interest. The only alteration is this—there is added an alternative prayer, which for the present purpose may be entirely put out of the case, but which seems to exhibit what was considered by the pleader to be the materiality of this question as to the £15,000. The alternative prayer is this—"Or if this Court shall not think fit to set aside the said purchase altogether, the said above-named defendants may be decreed to replace the sum of £15,000 improperly paid in shares to the defendants Engelbach and Keir in excess of the purchase money payable to the vendors."

The idea, therefore, does not at this time seem to have been that the question of the payment to Engelbach and Keir of £15,000, introduced by way of amendment, gave any new aspect or any new strength to the main case alleged by the bill, the case for the repetition of the whole purchase money, but that it gave rise to a separate and alternative relief which might become available if the other relief primarily sought were not given, namely, the relief to have back the £15,000 upon the grounds I have mentioned. That is entirely out of the case, because that relief was not ultimately given. The result therefore is this, as I read it, although it is true there is this difference between the original bill and the amended bill, that whereas in the original bill nothing was said specifically or particularly about this £15,000, it is mentioned particularly in the amended bill, and is mentioned, I will concede, in a way that may add an additional adminiculum of proof of fraud, yet it is mentioned as a separate ground for relief which has become immaterial.

Before I consider whether the addition of an additional ingredient as to fraud would become material, the question arises, When did the plaintiffs know of this payment of the £15,000? Now, my Lords, here the dates are material. The bill was amended, as I have said, and assumed its final shape, on the 3d of March 1874. The statement in the present condescendence on that subject is this—"There were several matters which were pleaded in the re-amended bill, and which emerged in the course of the Chancery suit already referred to, and on which the decisions in that suit proceeded, which were not stated or pleaded upon by the appellants in their condescendence and pleas in their said former appeal, and which were not known to them at the time of the closing of the record in the said appeal. The statements made in answer are denied, and it is explained that until the several answers of Engelbach and Keir and Ramsden, filed respectively on the 12th January, 23d April, and 27th April 1874, were put in in the Chancery suit, the appellants had little or no knowledge of the history of the formation of the company and most of the fraudulent transactions relating thereto, as, for instance, the alteration of its shares for Stock Exchange purposes, the agreement to pay £15,000 as a bribe to Engelbach and Keir in order to induce them to accept the title, the circumstances under which the requisitions were waived and the title accepted, and the several deeds and agreements prepared and executed by which the concession was foisted on the company." Then they go on to say that they had not made a discovery of the documents until afterwards.

Now, my Lords, taking that as it is stated, it would appear that certainly at the latest on the 27th of April 1874 they had knowledge of it. It must of course have been known to them before

that; it must have been known to them on the 3d of March, when the bill was amended; indeed on the 12th of January they must have had some knowledge by that answer. But we have now this clearly that in the answer of the defendant Ogle, which was put in on the 22d November 1873, there was a statement that this £15,000 had been paid.

My Lords, your Lordships are informed by the learned Judges of the Court of Session that although the record was closed in the original proceeding in Scotland before the 3d of March 1874, the proof was not led in it until the 15th of June 1874, and that it would have been competent and almost a matter of course for the Phosphate Company at any time before the proof was led, on ascertaining this additional fact or these additional facts, if they considered them material, to have applied to open the record and close it again and led their proof upon the whole of the facts which had thus come to their knowledge.

Now, my Lords, these being the facts of the case, my first observation is this—As I understand the law with regard to *res judicata*, it is not the case, and it would be intolerable if it was the case, that a party who has been unsuccessful in a litigation can be allowed to re-open 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. My Lords, 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 in 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.

My Lords, that being so, it appears to me that it would be contrary to the whole principle upon which litigation under the rule of *res judicata* is made to be final to allow this litigation to be re-opened upon the ground which is alleged. It appears to me that looking at this, as we must look at it, as a fresh litigation commenced in Scotland, those who are commencing it have nothing upon which they can base it except an allegation that there was not in the former litigation a mention made of the payment of this £15,000, and of the shares into which it was turned, and that those facts not having been mentioned upon the former occasion the Phosphate Company should therefore be allowed to have a new litigation in order to introduce those facts. They are met at once by the circumstance that the facts were within their knowledge, and that they might have taken proceedings to have brought them before the Court on the former occasion.

It appears to me, my Lords, that the unanimous decision of the learned Judges of the Court below—the Lord Ordinary and the Lords of the Inner House—is one which is entirely satisfactory. I do not go into any greater detail, because the case has been so fully and satisfactorily disposed of by them. I shall simply submit to your Lordships that this appeal should be dismissed with costs.

Lord Hatherley—My Lords, I have listened to the opinion which has been delivered by my noble and learned friend on the woolsack, and in that opinion I entirely concur.

I confess that during a portion of the argument of this case I was very much struck by the length to which it was supposed that the doctrine could be pushed of amending a case by introducing matter which was in the knowledge (as this turns out now to have been) of the parties making the claim, provided only that that new matter would give them a new and additional cause for advancing their suit, and a new and additional right to have that suit decided in their favour. I asked during the argument for authority for a reference to any case in which persons had been allowed to do that when they had had full knowledge of the various ingredients making up a case of fraud, which materials in many cases are extremely abundant, but had exercised the right of keeping back a portion of those materials within their knowledge which might possibly have led to some variation in the relief granted, and which were but part of the one great scheme of fraud, and were treated by them in the last instance as part of the one great scheme of fraud, by which they were deceived, and in respect of which, as in the present case in the Court of Chancery in England, they obtain relief.

The course which this cause took in the Court of Chancery was this—the record alleged certain *indicia* of fraud, which seem to have been sufficient in the minds of the Judges of that Court to establish the case as alleged in the first claim in that suit. Afterwards it was found that there was additional and considerable evidence of fraud, namely, the bribing of an agent who had been employed in carrying the transaction into effect. That seems to have been discovered after the filing of the original bill in the suit below, but in time to have it inserted by way of amendment in the bill which was amended about a year afterwards, and in time to have it inserted also, if the parties had chosen so to do, in the record in the litigation which they were carrying on in Scotland in reference to establishing a claim against the estate of Lawson & Sons. They failed upon the previous occasion, as has been described by my noble and learned friend on the woolsack, in the Courts in Scotland, and ultimately in this House.

The additional matter seems to have come to the knowledge of the parties who are the

appellants in the present case between the period of their filing their original bill in Chancery and the period of their amending it on the 3d of March 1874. Probably the first intimation which they received of it was derived from the answer of Ogle, to which reference has been made. What was done upon that occasion? No doubt it was an instance of gross fraud. That must be the character of an attempt to bribe the agent of any person with whom you are dealing with respect to a purchase or a sale—for it would be the same in either case—in order to bring you (the purchaser or the vendor, whichever you might be) into a position in which by false representations or by silence, where there ought to have been disclosure on the part of your agent, you have been led, believing your agent to be honest, into either the sale or the purchase in question which you desire to get rid of. If it had been a case of a sale of your own property, the agent could not so well be bribed out of the fund which was to be produced as the result of the fraud, but in the case of a purchase of course there are ways and means, some of which were adopted in this case according to the statements before us, of bribing the agent by giving him a share of the purchase money which is to be obtained by means of his agency and his fraud. When that takes place, there are two or three ways in which the fraud may be perpetrated, and two or three methods also in which the person defrauded may secure a right to be recouped in respect of the injury he has thereby sustained. Either he may do as has been done in the case of this bill, in which this fraud of paying the briber was brought forward, or he may say—If you do not give me the larger relief which I think I am entitled to (and which he ultimately obtained in Chancery), at least set me right with my agent, and take care that I have the £15,000 which he has received or obtained a right to receive as between himself and his co-conspirators, whatever may become of the larger claim I make. (Ultimately the larger claim was sustained, and therefore the £15,000 was at once put out of the question.) Or a second point upon which he may rely is this — This was a portion of the fraud I alleged in my original bill; my original bill stated a case of fraud, upon which I said I was entitled to relief, but I can now fortify it by showing that he who ought to have protected me, namely, my own agent, has been himself a party to the fraud, and has been a co-conspirator with the rest in endeavouring to defraud me of my money. That is only an additional proof of the fraud alleged.

Therefore, my Lords, I come round again to this question—Is it or is not the law (I do not know any authority going to that extent) that if a man has been the victim of a fraud of this description, in the purchase of a mine or the like—if a man has been led and induced to become the purchaser of property by a variety of fraudulent misrepresentations—he may bring forward his case and enter upon a litigation for the purpose of putting himself in the position in which he was before the fraud was committed, and that he is to be allowed to select a certain number of instances of that conduct which led up to the successful result of the fraud—to select as many of those instances as he may think proper—and to put them in the forefront of his proceedings to set aside the transaction, and afterwards, having a certain number of other circumstances within his knowledge, he is to be allowed to bring forward those circumstances and say—This is a new *medium concludendi* with regard to the case I am now bringing forward; this will be an independent case which I shall be entitled to assert? If so, we might go through all the various circumstances and acts of fraud which led to the result—we might go through them one by one and year by year, so far as I can see, according to that line of argument. From time to time, as the matter passes through all the stages of litigation, the plaintiff might say I have now brought forward another fact; this is a fact which you have not yet decided upon; this is not *res judicata*, because it is a portion of evidence which I have not presented to your minds before. I have failed to prove, or I have failed to satisfy you of the sufficiency of the proof with respect to the several facts I alleged in my original attempt to obtain justice, and now I proceed to bring forward other facts of a still stronger character which I think will persuade the Court I am addressing to give me the relief which upon the first showing of the case they were not satisfied to give me upon the evidence I was then able to produce. My Lords, I should be very much surprised if that was held to be the doctrine of any Court, or if in any civilised country litigation could be protracted in the endless manner that it would be if that were the state of the law. However, my Lords, in this case what has happened? The information was acquired, as has been described, at a time when the appellant might have introduced it. He did introduce a statement of it into the bill in Chancery by an amendment, and he might have introduced it into this claim in the Scotch Court by amendment also, as we are told by the Scotch Judges, at the time he became acquainted with it, although it was after the record was closed, upon making a due and proper application to have an opportunity of so stating his case. He brings it in as a simple *indicium* of fraud without insisting upon any other relief, because he obtained from the Court of Chancery that which he considered much better than the alternative relief which he glanced at, but did not further pursue, when he first introduced the mention of the bribe of £15,000.

He having done that, it appears to me, my Lords, to be quite clear that it falls within the operation of the plea put in on the other side in this action, and therefore all that we can do is to follow the view which has been most clearly and admirably expressed in the several judgments in the Court below. I think that those learned Judges have come to the right conclusion, and that their interlocutor which is complained of should be affirmed, and that this appeal ought to be dismissed with costs.

Lord Blackburn—My Lords, I am entirely of the same opinion as my two noble and learned friends who have already spoken, and I should scarcely have thought it necessary to add anything if it was not that I wish to point out that there are a great many of the topics which were discussed in the Court below, and have also been discussed at the bar, which do not seem to me to come into question, and upon which it is not necessary to pronounce any opinion at all.

The real point upon which the case turns may,

I think, be stated very briefly. In this case the plaintiffs, the Phosphate Sewage Company, in the first proceedings which they took in Scotland, went before the trustee and claimed to prove for £65,000 and interest on this ground—They said Peter Lawson & Sons were the vendors of property for £65,000, the contract of sale was voidable on the ground of fraud, and we have chosen to avoid it, and consequently Peter Lawson & Sons before their bankruptcy owed us £65,000, and we are entitled to prove for that with interest. Such was the claim which was made before the trustee, but the trustee did not allow it. They appealed then to the Court of Session, who, according to the course of proceedings in Scotch bankruptcy, proceeded to allow a proof, and made up a regular record, which ultimately came up to this House. The plea of law upon which the Phosphaté Company then sought to prove their claim expressly stated that, the contract having been annulled, they were entitled to prove against the vendors for the price. That was their plea of law, and the ground upon which they had put it. They also set up the claim that as they had already commenced proceedings in the Court of Chancery to set aside this contract against Lawson & Sons, it followed that the Court of Session should stay their proceedings until the Court of Chancery had decided upon that. That the Court of Session refused to do, and accordingly the matter went down to proof. The result was, upon the proof of the allegations in that first appeal against the trustee's decision, the plaintiffs the Phosphate Company failed to prove to the satisfaction of the Court of Session that they had ground for annulling the contract, and consequently they failed to prove that they had anything in respect of which they could claim.

They went on in the meanwhile with their suit in the Court of Chancery in England. Ultimately after the Scotch Court had pronounced its decision, and after the decision of the Scotch Court had been affirmed by this House, the Chancery Division of the High Court of Justice did pronounce a decision in which they decided upon the materials before them that the contract had been obtained by fraud, and that there was good ground for annulling it. Then the plaintiffs went down to Scotland and made a fresh claim before the trustee; they were freshly refused; they proceeded again to appeal against that refusal, and they had then a record made up in which there was a plea of *res judicata*, which has been allowed in the Court below. The one question is now, Is that plea of *res judicata* on this matter an answer to their claim as they made it the second time, founding upon everything that had been proved in the Court of Chancery in England and upon the decree—for they did found upon the decree of the Court of Chancery also so far as it would go?

As to that, my Lords, I think the law of Scotland is clear enough that upon an ordinary action, where you seek to recover anything, *res judicata* is an answer subject to two observations. The one is that where there is *res noviter veniens ad notitiam*, which is nearly equivalent to saying that you were taken by surprise, and have since discovered material evidence, you have a ground; if there is *res noviter veniens ad notitiam* (I do not at present inquire when or under what conditions), then the plea of *res judicata* will not avail. Now, here it is alleged that various matters freshly came to the knowledge of the appellants. I will not weary your Lordships by repeating over again what has been so clearly stated by the noble and learned Lord on the woolsack, that all that is alleged to have freshly come to their knowledge is proved to have come to their knowledge at a time when they might have pleaded it against the first determination of the trustee. Secondly, there is a ground where there is a fresh *medium concludendi;* the plaintiff in the action is not obliged to join all his *media concludendi* in one suit; if he has one *medium concludendi*, and fails in proving that, he may start another, and that whether or not he knew of it at the former time, provided it be a separate *medium concludendi.*

Now, my Lords, in the Court below it was doubted whether an appeal against a decision of a trustee in bankruptcy comes within the rule, and there was very good and plausible reason suggested for holding that it is not like an ordinary action, and that the parties appealing were bound, since they did start upon it, to produce their whole case of claim, and if they had a score of different *media concludendi* to establish the fact that they could prove against the sequestration, they were bound to bring them all forward. That is one of the points which have been discussed, but it is not important to decide it, and I therefore say nothing about it.

Assuming, however, that the appeal against the decision of the trustee is like an ordinary action, and assuming (what I by no means wish to be supposed to say) that in that case you may bring a new action on a fresh *medium concludendi*, although you knew of it before, there arises the question, Was what is now produced a fresh *medium concludendi?*

One word I may say upon an argument which, however, was almost abandoned before the discussion was finished. The Court of Chancery decided that this contract was voidable, and set it aside, and when the appellants came with the decree of the Court of Chancery, saying, The contract has been annulled, and the price is repayable by Lawsons among others, they attempted to say, That is a fresh *medium concludendi*; and even if it were, a foreign Court, provided that Court had jurisdiction, the Court of Session in Scotland or a Court in any other country ought, either from comity—that is to say, politeness—or as a matter of right, to give force to that judgment. My Lords, I need hardly point out that no question really arises here upon what ground a judgment of a foreign Court is or is not to be enforced. Putting it upon the very highest ground, that the defendant against whom the judgment has been given in a Court having jurisdiction over him is under an obligation to obey that judgment which will be enforced by the Court in Scotland, it is equally clear here that the Phosphate Company, which had sued in Scotland, are under a perfect legal obligation to obey the decision of the Court of Session, affirmed by this House as the Supreme Court of Appeal for Scotland, and it would be enough to say that that decision was entitled to equal respect. But for two reasons it happens to be entitled to very superior respect—in the first place, the Scotch judgment was given first, and, in the

second place, the Scotch judgment was given in Scotland, which was the domicile—the country—in which the action was brought. Therefore I take it that it is quite plain that if the decision of the Court of Chancery is to be considered as a foreign judgment, which probably it is in Scotland, no question of enforcing it arises here.

The question is entirely reduced to this one point, and this one point only, Were the matters alleged new? The Phosphate Company say that in the present appeal against the second decision of the trustee they rely upon the amended bill. The new matters are very easily seen there, because they are printed on the bill in red ink. They are alleged in the condescendence upon which the parties proceeded in the present case. They proceeded upon these new matters in their bill, and the question, I apprehend, comes to be at once, Are these new matters? I think it amounts in substance to this, that it was found out—but not too late to put it in the proceedings in the present case—that amongst other means of carrying out the fraud the Lawsons had been parties to giving a bribe of £15,000 to Engelbach and Keir, who were parties to the fraud.

My Lords, upon the question whether that is a new *medium concludendi* or merely a piece of evidence tending to support the former case, I am very clearly of opinion that it is only a fresh discovery of evidence—a fresh ingredient tending to prove the fraud upon which they relied. I do not enter into the details upon which I found that opinion. They were stated first of all very clearly by Lord Shand in his judgment, and they have been since stated very clearly by my noble and learned friend on the woolsack, and by my noble and learned friend opposite, and I am not going to waste your Lordships' time by trying to throw fresh light upon what has been three times, to my mind, most satisfactorily stated.

Lord Gordon concurred.

Interlocutors appealed against affirmed, and appeal dismissed with costs.

Counsel for Appellants—H. Davey, Q.C.—A. Young. Agent—John Holmes, Solicitor.

Counsel for Respondent — Arthur Cohen, Q.C.—Mackintosh. Agents—Laurance, Plews, & Baker, Solicitors.

Monday, July 21.

THE MAGISTRATES AND TOWN COUNCIL OF EDINBURGH *v.* M'LAREN AND OTHERS.

(Before Lord Hatherley, Lord Blackburn, and Lord Gordon).

Trust—Immixing of Charity Funds—Increased Value of Estate—Proportional Division of Profits.

The funds of a specific mortification which were made over to a corporation for certain purposes about the year 1700 were immixed with other funds held by the same corporation in trust for the same object, and they were administered in common. The accounts were kept and payments were made in a mixed and unseparated form. In various other particulars the conditions of the bequest were not complied with, but not from any improper motive. *Held* (1) that no lapse of time could interfere to prevent the testator's intention from receiving effect, and that the bequest fell to be administered upon that footing; (2) that the mortification fund had become so immixed with the other fund belonging to the corporation that it must be taken to have participated proportionally with them in the increase of value of the aggregate funds which had taken place since the date in question.

This was an appeal against two interlocutors of the First Division of the Court of Session dated 10th July 1875 and 19th March 1878, taken by the Magistrates and Town Council of Edinburgh in an action against them at the instance of the beneficiaries of the Trinity Hospital of Edinburgh. The Lord Advocate appeared also as a party to the action in virtue of the Trusts (Scotland) Act 1867 (30 and 31 Vict. c. 97).

The facts of the case sufficiently appear from the opinions of Lord Blackburn and Lord Hatherley. The case is not reported upon this branch of it in the Court of Session.

At delivering judgment—

Lord Blackburn—My Lords, the Town Council of Edinburgh were the administrators of Trinity Hospital, and as such held considerable funds before the year 1696. In that year Mr James Alexander died, having previously made a mortification to the Lord Provost and Town Council of Edinburgh and their successors in office, and the ministers of the said burgh present and to come. The ministers at that time did not take any steps to assert their right to join in administering this mortification. The Council got possession of the funds, and from the time they did so down to the making of the interlocutor appealed against administered those funds as if they had been mortified to them as administrators of the funds of Trinity Hospital.

In a suit for the proper administration of the funds of Trinity Hospital the Court of Session had to decide a great many questions. Two and two only of their decisions are now by this appeal brought before this House—1st, The Court of Session decided that the funds of the Alexander mortification ought to have been from the beginning administered by the Council and the ministers, and not by the Council alone, and that notwithstanding the length of time during which a contrary practice had prevailed they could not sanction it in future; and that the funds of that mortification must be in future administered, in terms of the mortifier's trust, by the Council and the ministers.

This was the first decision appealed against. I think none of your Lordships who heard the argument doubted that the Court of Session could not have decided otherwise, and the counsel for the appellants were not able to urge anything substantial against this decision.

But then, having determined that the Alexander fund was to be administered separately in future, there arose a question, what was the fund which was to be so administered? I do not think that I can state the point more briefly than is done by