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.

facts relevant and sufficient to support their conclusions, and assoilzied the defenders from the conclusions of the action. The Court, on a reclaiming note, adhered, with this variation, that they assoilzied "the defenders from the action as laid."

The pursuers now raised the present action, with conclusions reductive of the lease *in toto*. The pleas were as follows—"1. The pursuers having been induced to enter into the contract in question by the fraudulent concealment, and false and fraudulent representations of the defenders, as condescended on, the pursuers are entitled to decree as concluded for. 2. The former action, and the judgment of the Court therein, cannot support the defenders' plea of *res judicata*, in respect that the allegations of the pursuers and the *media concludendi*, were essentially different in the former action from what they are in the present."

The defenders pleaded, *inter alia*, that the judgment in the former (or second) action, formed *res judicata;* that the second contained no relevant averment of facts to shew fraud; and that the present action was also irrelevant, in respect, "1*st*, There was no duty of disclosure on the part of the defenders in regard to any of the matters which they are alleged to have concealed from the pursuers; and, 2*nd*, The defenders had no peculiar knowledge, or peculiar means of knowledge, in regard to any of the matters which they are alleged either to have misrepresented to the pursuers, or concealed from them, and it is not relevantly alleged that they had."

The Court of Session held that the first judgment was not *res judicata*.

Mrs. Gillespie appealed against the interlocutor in the first action maintaining, in her *printed case*, that the judgment should be reversed,—"1. Because the allegations of the appellants were relevant and sufficient to entitle them to an opportunity of establishing their case to the satisfaction of a jury, and, if proved, the appellants' allegations would shew that the lease in question was obtained by falsehood and fraud on the part of the respondents, and in that view ought to be reduced and set aside. 2. Because, in place of sending the case for trial to a jury, the Court below proceeded partly on an assumption of material facts, and partly on hypotheses and speculations for which there was and is no foundation, so far as yet ascertained."

The *respondents* appealed against the judgment of the Court of Session in the second action, and pleaded—"1. *Res judicata*, in respect of the judgments in the previous action of reduction, &c., at the instance of the respondents against the appellants. 2. The respondents' statements in the summons and in the record were irrelevant, and insufficient to support the conclusions of the action. 3. In particular, the summons and record contained no relevant averments in point of fact to shew fraud on the part of the appellants, and to support the reductive conclusions upon that ground. 4. The action was irrelevant and could not be maintained, in respect—1st, There was no duty of disclosure on the part of the appellants in regard to any of the matters which they were alleged to have concealed from the respondents; and, 2nd, The appellants had no peculiar knowledge, or peculiar means of knowledge, in regard to any of the matters which they were alleged either to have misrepresented to the respondents, or concealed from them, and it was not relevantly alleged that they had. 5. The respondents having had the means of ascertaining for themselves the value and capabilities of the mineral field in their estate, could not reduce the lease thereof to the appellants upon any of the grounds set forth in their condescendence and pleas."

Mrs. Gillespie maintained in her *printed case* that—"1. The former action did not support the plea or defence of *res judicata;* or, in other words, because the present action proceeded on different grounds from the former. 2. That the appellants' plea or defence of *res judicata* was properly repelled, but also because their plea or defence of irrelevancy was properly dealt with by the Court below."

Rolt Q.C., and *Anderson* Q.C., for Mrs. Gillespie—We are willing to give up the appeal in the first action of reduction, and to take our stand on the second action. The allegations of fraud and misrepresentation, and improper concealment of material facts, are specific enough in our condescendence. It is true that the question whether a mere non-communication of a material fact by one party will vitiate a contract entered into by the other party, in ignorance of such fact, may be considered an open question—how far a party may remain passive in making a bargain. See *Fox* v. *Mackreth*, 1 Tudor's L.C., 104; 2 Cox, 320. But, at all events, it cannot be doubted, that where there is any active dissimulation entering as an element into the transaction, that will vitiate the contract—*Hill* v. *Gray*, 1 Stark. 434.

[LORD CRANWORTH.—Suppose at an auction an auctioneer says, "I'm not at liberty to mention whose property these things are," and a bidder says, "Oh, I'll bid, because I know they came from Smith's," and the auctioneer says nothing, is the auctioneer bound to tell that bidder, "Sir, you're mistaken?"]

[LORD BROUGHAM.—That is making a man tell a lie by holding his tongue.]

The mere abstaining from saying anything may often amount to misrepresentation according to the respective circumstances and mutual relations of the parties. These are, doubtless, fine distinctions; but where any duty is imposed on a party to make some reply, or where, according to the common sense of mankind, silence means consent, then such silence may be equivalent to active misrepresentation. On the other hand, where a party in an officious way imposes

questions and remarks on another, it may admit of great doubt, how far either duty, or honour, or good sense dictates a necessity for any reply. But where there is a case like the present, when a landlord, about to mention a rent which he will be willing to take for his land, says to the proposed tenant, "I suppose £200 is a fair price, there's nothing uncommon about the land," and the tenant, all the time knowing there is a valuable mine in the land, of which the landlord knows nothing, makes no remark, or acquiesces in what the landlord says, and does not communicate the fact of the mine existing—that will be dissimulation on the part of the tenant. [LORD CHANCELLOR.—Then suppose the landlord goes on the assumption you mention in his own mind, but never makes any remark at all, nor says anything, would you call it fraud if the tenant does not volunteer his important information?]

That again brings us round to the nice point which does not require to be argued here, for there is more here than mere reticence or non-concealment; there is a direct challenge on the part of the landlord for information, and that information is withheld, and a contrary inference made unavoidable. That accordingly is equivalent to active fraud—*Picard* v. *Sears*, 6 A. & E. 469; *Turner* v. *Harvey*, 1 Jac. 169; *Jones* v. *Keen*, 2 M. & Rob. 348; *Pickering* v. *Dowson*, 4 Taunt. 779; *National Exchange Co.* v. *Drew*, 2 Macq. 103, *ante*, p. 482; see also *Laybour* v. *Wilson*, 2 Wheaton's Amer. Rep. 178; *Matthews* v. *Bliss*, 2 Pickering's Amer. Rep. 48; and authorities collected in 2 Kent's Com. 641 (last ed.).

As to the plea of *res judicata*, the interlocutor in the first action of reduction was not a general absolvitor on the merits, but merely an absolvitor on the ground that the allegations were not sufficiently precise. That would not be *res judicata* in a subsequent action, where the facts were sufficiently alleged. The nature of the fraud alleged is different in the one case from what it is in the other. We did not allege positive misrepresentation in the first case, but stated it inferentially; but now we state positively and directly, that the defenders fraudulently misrepresented that the coal was inferior, &c., in order to procure the lease at a low rent.

The *Attorney-General* (Bethell), and *Young*, for Messrs. Russell.—The interlocutor in the first action of reduction is *res judicata* in the second action. The words "as laid" added to the interlocutor amount to nothing, for the interlocutor without them was conclusive as to all other actions brought on the same *medium concludendi* or head of equity. The action consists in the reasons of reduction alleged in the condescendence and pleas in law; and they are founded on precisely the same *medium concludendi* in both cases. The party absolved is absolved from every ground of action which falls under the same head, and from all the grounds under that head which the pursuer knew at the time. It was immaterial, in that view, whether the allegations were insufficient or not. The fundamental principle of all laws is, that a party is not to be twice vexed for the same cause of action—Vinnius, 4, 13, 5; and here the defenders are twice vexed. It was the duty of the Court of Session to see that everything was pleaded which could be pleaded, and after closing the record, it is beyond the power of the Court of Session to admit a second action. If the pursuer had failed to allege his facts properly, or had been misled by bad advice of counsel, he has only himself to blame, and must suffer for it; but he cannot be allowed to raise a second action. His proper course was to apply to amend the record before it was closed, for, after that stage, he was foreclosed from making any new averment of fact, except it was *res noviter;* or he might have abandoned his action, and commenced *de novo.* The plea of competent and omitted applies to the pursuer in the second action—*Campbell* v. *Stewart*, 16 S. 632; *Strathmore's Trustees*, 11 S. 644; *MacDonald* v. *MacDonald*, 2 D. 889. At all events, he is bound to bring forward all the facts within his knowledge appropriate to the ground of action on which he proceeds.

Even if the plea of *res judicata* is not valid, there are no sufficient allegations of fraud alleged; all is mere inference and conjecture from irrelevant facts.

Cur. adv. vult.

LORD CHANCELLOR CAMPBELL.—My Lords, in these cases I understood both sides to say, that they would be satisfied if the House gave judgment on the sufficiency of the plea of *res judicata* pleaded in the second action of reduction.

I am of opinion that that plea is insufficient. We must consider what is the matter that has been adjudged in the first action of reduction. If the absolvitor had been a general absolvitor on the merits of the cause, there would have been strong ground for contending that the judgment in the first action is a bar to the second; for the parties are the same, and the petitory conclusions are substantially the same. To see what was adjudged we must look to the record, and this shews, that in the first action there was no final determination of the merits of the cause.

The defenders' second and third pleas in law are in the following words:—"2. The statements in the condescendence are irrelevant and insufficient to support the conclusions of the action; and generally, the action is irrelevantly and insufficiently laid. 3. In particular, the condescendence contains no relevant allegation of facts to shew fraud on the part of the defenders, and to support the reductive conclusions upon that ground." These are the two pleas. The Lord Ordinary expressly confines his judgment to these two pleas. He finds (these are the words of

the interlocutor) "that the pursuers have not averred facts relevant and sufficient to support the conclusions of the libel." He therefore "sustains the 2d and 3d pleas for the defenders, and assoilzies the defenders from the conclusions of the action." He assoilzies these defenders from these conclusions only on the ground which he has stated—that for want of proper allegations and averments "the action was irrelevantly and insufficiently laid." This interlocutor, as framed by the Lord Ordinary, when properly examined, shews that there was no final determination on the merits of the cause.

But being brought by appeal before the First Division of the Court of Session, it was varied in a manner which seems to me to remove all doubt upon the subject. Instead of assoilzieing "the defenders from the conclusions of the action," (these are the words used by the First Division of the Court of Session,) "the Lords assoilzie the defenders from the action as laid," the 2d plea being that the action was irrelevantly and insufficiently laid.

There is no express declaration on the face of the interlocutor, that this judgment was without prejudice to another action being brought, which might contain proper averments and allegations; but such seems to be the necessary intention of the Court.

The counsel for Russell and Son contended, that, by the Judicature Act, the Court was bound to decide finally on the merits of the cause. But it is unnecessary further to consider this question; for if the judgment of the Court should be considered defective or irregular, nevertheless, as it has abstained from finally deciding on the merits of the cause, it cannot be deemed a bar to another action. The authority of Vinnius, therefore, and the cases cited about "competent and omitted," have no application.

In the second action of reduction, I think that the action is properly laid; for the summons and condescendence contain apt averments and allegations, and disclose facts which, if true, prove that the defenders not only failed to communicate important information which was exclusively in their possession, but resorted to artifice, dissimulation, and fraud, to deceive the pursuers, and to prevent them from coming to the knowledge of the existence of the vein of valuable gas coal. The consequence is, that issues are properly directed; a jury will say whether the pursuers' averments and allegations of fraud are true, and complete justice will be done between the parties. But to hold that the judgment in the first action, which decided matter of form only, is a bar to the second action, which is properly laid, would in my opinion, be a denial of justice. The result is, that, according to the arrangement made, the first appeal being withdrawn, the second appeal will be dismissed.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend. Whatever doubt I might have respecting the interlocutor of the Court below in the first action—as to whether or not I may be of opinion that fraud and misrepresentation were sufficiently laid—it is perfectly unnecessary to go into that, because I have no doubt whatever that that interlocutor was only an absolvitor of the defenders from the conclusions of the libel as laid; and this I should be disposed to think, even if the First Division had not amended the interlocutor of the Lord Ordinary by adding the words "as laid;" for I consider that the Lord Ordinary, when he pronounced his interlocutor, could only mean to absolve the defenders from the conclusions of the libel as laid; and that, therefore, there could be no doubt whatever that this is not *res judicata.* Even if the Court had not added the words "as laid," I should have held it to be so; but they having added these words, I agree with my noble and learned friend that it leaves no doubt what the object of the Court was, namely, to leave it perfectly clear and undeniable that the pursuers had the power of bringing a fresh action.

LORD CRANWORTH.—My Lords, I have very little to add to what has been already stated by my noble and learned friends who have preceded me. There is no doubt that, looking at the language of the interlocutor, all that is in terms decided is as my noble and learned friend has pointed out. There is no doubt that in terms all the interlocutor decides is in favour of the 2d and 3d pleas. I cannot conceal from your Lordships that I have entertained, and, but for the unanimous opinion of the rest of your Lordships who have heard the case, I confess that I should still entertain some doubt, whether, as the interlocutor is now framed, the true meaning of it is not, that, upon the ground of fraud, the Court adjudged in favour of the defenders. But, however, that does not appear to be the view taken by three out of the four Judges in the Court below; and I find that all your Lordships except myself take the same view as the great majority of the Judges in the Court below took. Therefore, all I can say is, that I agree in the views of my noble and learned friends who have already addressed your Lordships, though not certainly with entire satisfaction as to the correctness of the conclusion at which I have arrived.

LORD CHELMSFORD.—My Lords, agreeing as I do in the opinion expressed by my noble and learned friends, I have very little to add to what has been already said. I think that the question has been properly reduced to a consideration of the interlocutor of the Court of Session in the second action of reduction. If the Court of Session were right in holding that the subject of that action was not *res judicata*, then it will be unnecessary, as regards the interlocutor in the first action of reduction, to consider anything but its nature and effect, without at all discussing its propriety. The Lord Ordinary, in the first action, decided upon the second and third pleas

in law of the defenders, and assoilzied them from the conclusions of the action. Those conclusions were, that the missive of the agreement, in so far as it included the mineral substance in question, should be reduced and declared to be null and void. The Court of Session adhered to the interlocutor of the Lord Ordinary; but, with this variation, that instead of assoilzieing the defenders from the conclusions of the action, they assoilzied from the conclusions of the action "as laid." Now, although assoilzieing the defenders from the conclusions of the action was in effect assoilzieing them from the action as laid, as my noble and learned friend, LORD BROUGHAM, has observed, yet the Court of Session appear to have thought that the variation which they introduced into the interlocutor would more accurately describe a judgment given upon the second and third pleas, which went to the sufficiency of the statement of the cause of action.

The second summons and condescendence state a case which, if proved, will entitle the pursuers to a reduction of the missive of agreement. To this the defenders plead *res judicata* in respect of the judgment in the previous action of reduction. The Lord Ordinary repelled the plea of *res judicata*, and the Court of Session adhered so far to his interlocutor. The appeal complains of these interlocutors, on the ground that the subject of the second action was *res judicata*. This, of course, sends us to the judgment in the first action. We have nothing to do upon this appeal with the question, whether the Court of Session was right or wrong in deciding that the summons and condescendence in the first action were irrelevant; nor is it necessary to consider whether they did not contain allegations, which might be equivalent to those in the second action, and which might have admitted the pursuers to proof of a case to the same extent as upon the second action. The only point necessary to be decided is, whether the judgment in the first action enabled the defenders to plead it as *res judicata* to the second action. It is unnecessary for this purpose to look further than the record, which upon the face of it expressly confines the judgment to a determination upon the sufficiency of the action as laid. It might perhaps have been competent for the Court of Session to have dealt differently with the first action, but your Lordships are not called upon to say what they might have done, but what was *de facto* the judgment of the Court in that action; and as there can be no doubt that all which they intended to decide, and which, in fact, they did decide, was, that the action was irrelevant and insufficiently laid, they cannot be said to have decided anything as to the merits of a case sufficiently laid as it is in the second action; and, therefore, the interlocutor deciding that the plea of *res judicata* ought to be repelled was right, and ought to be affirmed.

LORD CHANCELLOR.—The question that I have to put to your Lordships is, that, in the case of *Russell* v. *Gillespie*, the interlocutor appealed from be affirmed, and the appeal dismissed.

Attorney-General.—Will your Lordships allow me to suggest, that the better course would be to dismiss both appeals?

LORD CRANWORTH.—I would suggest that, as there is an appeal and a decision on each side, the better way would be to dismiss both appeals.

LORD CHANCELLOR.—We may consider that this appeal is dismissed with costs, on the terms that they withdraw the other appeal.

Attorney-General.—I should submit that the best course will be to dismiss both without costs.

Mr. Anderson.—There are three appeals before your Lordships. The second appeal is a cross appeal. If both first and second are dismissed without costs, that will be a balance of one against the other. Then the last appeal, the appeal on which your Lordships have now given judgment, will be dismissed with costs, because we have had to meet two appeals.

Attorney-General.—That is not an original appeal. It is merely a cross appeal, which never creates any expense.

Mr. Anderson.—I beg your pardon; it does indeed. There were separate cases put in, and we have been heard upon the whole matter.

Attorney-General.—There was merely a petition presented.

Mr. Anderson.—No, we had separate cases put in.

Attorney-General.—We should not have presented our appeal, if they had told us that they meant to abandon the other.

LORD CHANCELLOR.—I have to put the question to your Lordships, that the appeal in *Gillespie* v. *Russell* may be withdrawn without costs, and that the appeal in *Russell* v. *Gillespie* be dismissed without costs.

Mr. Anderson.—And the third appeal in *Russell* v. *Gillespie* will be dismissed with costs.

Attorney-General.—No; that is the appeal which your Lordships have just dismissed.

Sir John Lefevre.—Is it understood that the appeal in *Gillespie* v. *Russell* will be withdrawn at the same time?

Attorney-General.—Yes, and that withdraws the other appeal without any costs. No one gets any costs.

The first and second appeals withdrawn by consent; the third appeal dismissed, and the interlocutors affirmed.

For Mrs. Gillespie and Husband, D.M. and H. Black, W.S. *Agents.*—*For James Russell and Son*, James Burn, W.S. *Agent.*