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HOUSE OF LORDS.

Tuesday, June 20.

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

(*Ante*, vol. xi. pp. 359, 707.)

Company—Contract—Price—Repetition—Misrepresentation—Fraud.

A company which was formed for the purpose of purchasing a concession of the fields of guano in a certain island from the grantees, nearly two years after its incorporation brought a claim against the grantees for recision of the contract and repayment of the purchase price on the ground of fraud and misrepresentation. Circumstances in which *held* that the Company had not established the claim.

Bankrupt—Trustee—Claim—Foreign—Bankruptcy (Scotland) Act 1856.

The estates of a firm carrying on business both in England and Scotland having been sequestrated in Scotland, an English creditor lodged a claim with the trustee, and at the same time raised proceedings in the Court of Chancery in England against the trustee in the Scotch sequestration and certain other parties to recover payment of the same debt as was the subject of the claim in the Scotch sequestration. The trustee having rejected the claim, the English creditor appealed to the Court of Session, and craved that proceedings should be sisted and a dividend effeiring to the claim should be set aside pending the issue of the Chancery suit.—*Held* (affirming judgment of Court of Session) that in the circumstances there were no grounds for interfering with the ordinary course of procedure.

On the 8th May 1869 the Government of San Domingo granted to Messrs Hartmont & Co. of London a concession of the field of guano or phosphate of lime in the island of Alto Vela for fifty years from 1st July 1869. By the agreement the Dominican Government were entitled to a royalty on all the guano exported, and further, were entitled to declare the concession null if a smaller quantity than 10,000 tons was exported annually. On 20th April 1871 the concession was assigned by Hartmont & Co. to Peter Lawson & Son, who on 28th April 1871 transferred the concession to the Phosphate Sewage Company (Limited).

During the first year of the concession no guano or phosphate of lime was exported from the island, and the concession was therefore liable to be declared null; and in October 1872 the Dominican Government did cancel the concession, on the ground that the conditions thereof had not been carried out.

The estates of Peter Lawson & Son were sequestrated on 11th February 1873, and James Alexander Molleson, C.A., was appointed trustee.

On the 14th March 1873 the Phosphate Sewage Company (Limited) lodged a claim in the sequestration for £70,529, 9s., being £65,000, the purchase price of the concession, and £5529, 9s. as interest on that sum from 31st May 1871, the date of payment, down to the date of the sequestration.

The Phosphate Sewage Company withdrew this claim on the 24th June 1873, being a few days before the period fixed by statute for the trustee making his first deliverance, they having on 19th April previously filed a bill in Chancery for the same amount against certain persons who had along with Peter Lawson & Son been promoters of the Company, and also against Mr Molleson as trustee.

On 20th July 1873 the Phosphate Sewage Company again lodged their claim in the sequestration.

On 27th October 1873 the trustee pronounced a deliverance rejecting the claim as unfounded, and the Phosphate Sewage Company appealed to the Court of Session.

The Phosphate Sewage Company maintained that they had a right to recover the sum claimed

from Messrs Lawson & Son on three grounds: First, on the ground that in a prospectus for the purpose of founding and obtaining subscribers for shares in the Phosphate Sewage Company, to be formed for the purpose of taking over the concession, it was alleged that the vendors (Messrs Lawson & Son) had expended more than £39,000 up to that time in connection with the island of Alto Vela. The second ground was that at the time the concession was professed to be sold by Lawson & Son to the Phosphate Sewage Company, it had in point of fact become void, because the quantity of guano which Messrs Lawson & Son, the concessionaries, were bound to export every year had not been exported. And the third ground alleged was that certain dealings had taken place on the Stock Exchange with regard to the shares which had been given by the Phosphate Sewage Company as the price for the transfer of the concession.

The Phosphate Sewage Company further pleaded that the proceedings in the sequestration should be sisted until the issue of the suit in the Court of Chancery in England, and that the amount of the dividend effering to the Company's claim should be set aside to meet the issue of the said Chancery suit.

The Lord Ordinary (SHAND) repelled the Company's pleas-in-law in reference to the Chancery suit, and allowed parties a proof, and the First Division, upon the reclaiming note, adhered to this interlocutor, and remitted the case to the Lord Ordinary in the Bill Chamber.

A proof was accordingly taken before the Lord Ordinary (YOUNG), who, without giving a judgment upon the merits, reported the case to the First Division, who refused the appeal at the instance of the Phosphate Sewage Company, and affirmed the deliverance of the trustee.

The Phosphate Sewage Company appealed to the House of Lords.

At giving judgment—

LORD CHANCELLOR—My Lords, the circumstances attending the litigation in this case are undoubtedly somewhat peculiar, and the peculiarity of these circumstances has led to a length of argument necessarily occupying a considerable portion of time, which, upon a more minute inspection of the facts of the case, will, I think, appear to be argument every portion of which it will not be necessary that I should advert to.

My Lords, I will remind your Lordships, in the first place, that the firm of Lawson & Son carried on business in Edinburgh and in London; they were sequestrated or became bankrupt in the beginning of the year 1873, and the trustee of the sequestrated estate was chosen in the usual manner in Scotland. The Phosphate Sewage Company, who are the appellants at your Lordships' bar, conceived that they had a right to make a claim against Messrs Lawson & Son or their estate in bankruptcy, on the ground that they had a right as against them to rescind a contract which had been entered into for the transfer or sale to the Phosphate Company by Messrs Lawson & Son of a certain concession, with some incidental rights, relating to a guano island belonging to the Government of St Domingo. The Phosphate Company, conceiving they had this right against the estate of Lawson & Company, applied in the ordinary way to prove a claim or debt against the estate in the month of March 1873. They made their claim before the trustee of the sequestration; and in that claim they stated that they were about to file a bill—in point of fact had prepared a bill to be filed—in the Court of Chancery in England, alleging their case against the estate of Lawson & Son, and against other persons as to whom they conceived that they were entitled to similar relief. In point of fact the bill in the Court of Chancery in England had not been filed, but it was filed shortly afterwards;—I think in the course of a month or two.

On, I think, the 24th of June in that year, within a day or two of the time when, according to the Scotch bankruptcy law, the trustee of the estate would be bound to make what is called his first deliverance—to pronounce his first judgment—on the debts claimed before him, lest the trustee should decide this case the Company withdrew their claim, and then, having tided over the first deliverance of the trustee, they re-introduced their claim on the 28th of June, four days afterwards, and kept it alive. The suit in the Court of Chancery in England was in the meantime going on. The respondent Molleson, the trustee, appeared in that suit and protested against the jurisdiction, and said that the proceedings in the sequestration were pending in Scotland, and that the claim ought to be decided there. That was in the month of July 1873, and from that time until the following January it appears that no proceedings were taken in the English Chancery suit. I daresay the delay could be accounted for by the difficulty of getting the answers from the other defendants. But in the meanwhile in Scotland the sequestration and the proceedings under it were going on, and the trustee, having before him a claim made by the Phosphate Sewage Company to prove against the estate, was obliged to adjudicate upon that claim. He did adjudicate upon it, and adjudicated adversely to the Phosphate Sewage Company. He expressed his opinion that they had no right to make the claim.

Thereupon the Phosphate Sewage Company appealed to the Court of Session—an appeal which it was competent to them by the law of Scotland to institute. By the law of Scotland, under an appeal of that kind it becomes the course, if the case is one worthy of solemn litigation, that the parties have an opportunity of lodging a condescendence, and a proof is given to them under the condescendence. Therefore a condescendence was lodged by the Phosphate Sewage Company, and was followed by pleas-in-law on their part and on the part of the trustee Molleson. That condescendence is to all intents and purposes, as your Lordships will observe, the pleadings in an English suit. It was just as much the pleadings of the parties in Scotland as the bill and answer are the pleadings between the parties in England, and to that condescendence your Lordships must look for the allegation of the case upon which the Phosphate Sewage Company found their right to a claim against the estate of Lawson & Son.

My Lords, I take the liberty of calling your Lordships' attention to the case which is made upon that condescendence, and which is followed by the pleas-in-law. The condescendence gives a narrative of the transaction with regard to this concession, and so far as the narrative re-

lates to those transactions, I will not delay your Lordships by going through it. But when I examine that condescendence for the purpose of discovering what is the fraud or the misrepresentation by reason of which the Phosphate Sewage Company say they have a right to rescind the bargain made with Messrs Lawson & Son, I find that the allegations amount to these:—There are three grounds, and only three, by reason of which it is alleged in the condescendence that the contract should be rescinded. The first is this, that in a prospectus for the purpose of founding and obtaining subscribers for shares in the Phosphate Company, to be formed for the purpose of taking over this concession, it was alleged that the vendors had expended more than £39,000 up to that time in connection with the island of Alto Vela, the island as to which the concession had been given. The vendors were Messrs Lawson & Son, The second ground was that at the time the concession was professed to be sold by Lawson & Son to the Phosphate Sewage Company the concession had in point of fact become void, because the quantity of guano which Messrs Lawson & Son, the concessionaries, were bound to export every year had not been exported. And the third ground alleged was that certain dealings had taken place on the Stock Exchange with regard to the shares which had been given by the Phosphate Sewage Company as the price for the transfer of the concession.

Now, as to the first of these grounds, very little was said in argument at your Lordships' bar on the allegation in the prospectus. Even supposing that Messrs Lawson & Son were to be connected with that prospectus—of which I am bound to say I have not seen any evidence satisfactory to my own mind—the allegation in the prospectus was this, that the exporters had expended more than £39,000 up to that time, not in any particular mode of expenditure, but in connection with the island of Alto Vela. And the books of Messrs Lawson & Son having been produced, there is no doubt that that statement is true to the letter. They kept an account of all their expenditure as to the island from the time they became connected with it, and there is no doubt their money accounts show the expenditure of upwards of the sum of money here mentioned. Whether other items by way of credit ought to be taken into account might be a question if the whole account had to be taken. But what we have to deal with is simply this allegation, which cannot be stated to be in any way a false allegation, or one containing misrepresentation.

My Lords, I will take the third ground next—with regard to the dealings in the shares—because that again has been very little argued at your Lordships' bar, for, in point of fact, my Lords, that is not a part of the case which can have any bearing whatever upon the validity of the contract between Messrs Lawson & Son and the Phosphate Sewage Company. Whether it is the case or not that shares given by the Phosphate Sewage Company as the price for the concession were handled or used improperly—used for the purpose of a fictitious value being run up with regard to them on the Stock Exchange—that is a matter subsequent to the contract altogether. It may be a matter as to which the shareholders in the Phosphate Company may have some claim to redress, but it is not a matter which will in any way go to void a contract which had actually been made before that time, and the validity or invalidity of which must be judged of anterior to the transactions in these shares.

Then, My Lords, I come, in the third place, to the ground which I reckoned as the second amongst the three, namely, the allegation that at the time of the contract the concession had become invalid by reason of the fact that there was not a proper export of guano. Now the matter stands in this way, the concession contained this clause (the 7th article): "In the event of the concessionaries not exporting the minimum quantity stipulated in article 3" (the minmum quantity being 10,000 tons of guano or guanito or phosphate of lime annually), "the Dominican Government shall have the right to declare the present concession void, and to take such measures as it may think proper." The concession was not to be void, but there was to be a right in the Government of San Domingo to declare the concession void under those circumstances. My Lords, at the time when the contract with the Phosphate Sewage Company was made it appears that the 10,000 tons per annum had undoubtedly not up to that time been exported. A short time, a year or two, had elapsed before the contract was made, and what course the Government of San Domingo would have taken in consequence, if matters had rested there, might be very doubtful. It does not appear that any price,, any gross sum, was paid for this contract in the first instance, which therefore the Government of San Domingo might have retained and held as forfeited. The Government of San Domingo were deeply interested in promoting the continuance of a concession which would bring in to them the royalties which were to be paid upon the exportation of guano. It cannot be said to be a matter of certainty, but it is probable from what we find here, that it would not be their interest or intention to take advantage of this clause enabling them to forfeit that contract.

But, My Lords, without dwelling upon that, what your Lordships find is this, that those persons who were acting on behalf of the Company, and whose acts on behalf of the Company are not in any way impeached on the face of this condescendence, although they have been impeached at your Lordships' bar—those persons, acting on behalf of the Company, and for whose acts the Company must be responsible, as they take advantage of their acts, were perfectly alive to the fact that the 7th clause of the concession was to the effect that I have read, and they made it one of the requisitions with regard to the title on the sale, that evidence should be given that the minimum quantity of guano had been exported, and that therefore the concession had not become voidable. The answer given to that was not an assurance of any matter of fact, but a statement that the purchasers must rest upon the covenants for title, and that covenants for title would be given. My Lords, when we remember what is done every day—as I took the liberty of reminding the learned counsel at the bar, with regard to sales of leaseholds—when we look at what the circumstances of this particular case were with regard to the Government of San Domingo, it appears to me by no means a strange

or unnatural course which was taken in this instance with reference to this question of the voidability of the contract. But at all events it is sufficient to say, that there is nothing in the matter which brings home to Messrs Lawson and Son any misrepresentation, any concealment, any fraud, for which the contract can, as to them, be voided.

Those, my Lords, are the grounds, and so far as I can find the only grounds, in the condescendence upon which it is sought to have it declared that the contract with Messrs Lawson and Son should be rescinded, and that they should be made liable to hand back any benefits they had received under it. But I must mention, in order to make clear what further I have to say, that two more grounds have been alleged at your Lordships' bar, and have been stated at the bar to be grounds which have come into prominence in the litigation in England, and to have been pressed in the litigation—and, as we were told, pressed with success against some or all of the defendants. It is said that in the price paid to Lawson and Son upon the occasion of this purchase by the Phosphate Company—a price which altogether amounted to £65,000—there was included £15,000, which did not go either into the funds of Messrs Lawson & Son or into the hands of those other persons who had interests along with them in the concession—I mean Hartmont and Co., and Ogle—and went, on the contrary, into the hands of two persons of the name of Engelbach and Keir, and that Engelbach and Keir were themselves acting as agents for the Phosphate Sewage Company, and were professing to constitute—to "get up," as it is called—that Company; and then it is said that £15,000 having thus been appropriated by those who were acting as agents for the Phosphate Sewage Company with the knowledge of Lawson & Son, the Phosphate Sewage Company had a right to repudiate the whole of the bargain, and that Lawson & Son, being privy to the mode in which Engelbach and Keir had acted, having allowed them to act as they did, must also be held liable to have the contract rescinded as against them. The second ground was this, that throughout the deeds which completed the sale of the concession to the Phosphate Sewage Company, Messrs Lawson & Son were treated as the vendors, and the only vendors, whereas Hartmont and his partners Begbie and Ogle had interests, and that the public at large were induced to look with more favour upon the Company, thinking that the property came from and was sold by Lawson & Son, than they would have looked upon it with, had they known that there were other proprietors who got part of the purchase money, that is to say, the persons whose names I have mentioned.

My Lords, I do not propose to ask your Lordships to go into an examination of the validity of these grounds for relief. I may say that upon the materials before your Lordships it is very difficult indeed to be satisfied that Lawson & Son are to be affected in any way with the knowledge that the £15,000 to which I have referred was paid to, was taken by, and was intended for, Engelbach and Keir. And with regard to the other ground, as to the persons who appeared to be the vendors, it seems to me to be a very violent assumption to say that, without more, the fact that those who have a prominent interest in property to be sold appear to be the only vendors selling the property, and that the other persons who have an interest, and who are to receive a part of the purchase money, are not named or made conveying parties upon the face of the deed, is necessarily a badge or indication of fraud. But, my Lords, it is sufficient to say that those are not grounds alleged upon the face of this condescendence, or this pleading, for any relief whatever in the sequestration in Scotland.

My Lords, in passing from the condescendence to the pleas, your Lordships will find that upon the condescendence, and without referring to the words of the pleas themselves, the issues that were taken were these:—The first issue was this—It was alleged that the suit having been instituted in England, the Court in Scotland ought to sist the proceedings there with regard to this claim, ought not to proceed upon it, but ought to wait for the adjudication upon the case of the Phosphate Sewage Company in a suit in the Court of Chancery, putting aside a dividend to await the result of that litigation. That was the first issue. The second issue was this, that the grounds of relief alleged in the condescendence—those three grounds to which I have specifically adverted already—afforded a reason why the contract should be rescinded and the Phosphate Sewage Company allowed to prove against the estate of Lawson & Son for the purchase money upon the recission of the contract. Now, my Lords, if the first of those issues, namely, the issue raised by the first and second pleas, that the proceedings ought to be sisted until the result of the proceedings in the Court of Chancery in England was known, were to succeed, of course your Lordships need not take any account of the other pleas as to the grounds of relief alleged in the condescendence.

My Lords, I will consider first the case for relief arising upon the first two pleas. Those pleas are these: the first plea says: "The present proceedings should be sisted until the issue of the chancery suit referred to, *as in the said suit the same questions are raised as in this process*, and will fall to be determined in a case in which the present respondent is a compearing party." And the second plea is, "the amount of the foresaid first dividend, and of any subsequent dividends effeiring to the appellant's claim, ought to be set aside to meet the issue of the said suit in Chancery; and an order should be pronounced upon the respondent to that effect."

Now, my Lords, I ask upon what grounds are those pleas to be maintained? There is a bankruptcy in Scotland—the assets to be administered are in Scotland, and the trustee, who is the guardian of those assets, is in Scotland. The persons who make a claim against those assets go to Scotland, and make their claim in Scotland, and they do all that before any proceedings whatever are instituted in England. They are allowed a condescendence, and they are allowed proof in Scotland. They may state any case which they have to allege upon their condescendence, and they may prove it upon their proof. They have a diligence by which they can recover all the documents which are in the possession of the defenders, and, as we observe here, they have the advantage of examining the persons who are princi-

pally concerned in the transactions which are impeached.

My Lords, if in that state of things there is any want of power in the Court of Scotland to adjudicate upon a case of this kind, then it may well be that the proceedings should be arrested or stayed in order that some other court, which has the power, may adjudicate upon the claim which is made. But is there any want of power in the Scotch Court? The learned Judges say there is not. The learned Judges unanimously tell us that it is the common practice of the Courts in Scotland, where a claim is made in a sequestration to constitute a debt, or to constitute a liability to damages, to admit the party claiming to constitute that claim if he is able to do so. A full opportunity has been afforded to the parties here to constitute their claim, if they are able. If they have not alleged in their condescendence as much as they have alleged in their bill in Chancery in England, it is their own act, and one for which no person but themselves is answerable. My Lords, I am bound to say that it appears to me that it would be casting upon the jurisdiction of the Court of Bankruptcy in Scotland, and upon the administration of the bankruptcy law in Scotland, a very considerable and a very grave reproach, if your Lordships were to accede to the argument that there is any want of power in the Court of Scotland to adjudicate in a case of this kind.

But then it is said that there are other persons who are parties in the suit in England, and that it is much more convenient that the matter should be adjudicated upon once for all in the presence of all parties. My Lords, I say, in the first place, it would be a very grave question whether the adjudication of the Court in England would not be examinable in Scotland, so far at all events as the judgment of a foreign court is examinable. But I by no means accede to the proposition, at least as a self-evident proposition, that it is convenient to have this adjudication in the presence of all the parties concerned. Your Lordships have been told that the circumstances under which, upon a claim of this kind proof is admitted in Scotland upon a bankruptcy are extremely different from the circumstances under which it is admitted in bankruptcy in England. The Court in England is asked to declare, not merely that Messrs Lawson & Son are liable, but that there is to be a right to a particular proof against their trustee in a Scotch sequestration. How is the Court of Chancery in England to tell what is the course in Scotland with regard to proof, or what is the kind of proof which, according to the Scotch law of sequestration, ought to be allowed? The case against Messrs Lawson, be it well founded or be it not well founded, is one which can be perfectly well separated from the case against the other parties, who are said to be liable to the Phosphate Sewage Company; and I can see no reason why the case, if there is power in the Scotch Court to adjudicate upon it, should not be adjudicated upon there. And I repeat, I also see no reason to doubt that there is perfect power in the Scotch Court to adjudicate upon it.

Therefore, my Lords, I submit to your Lordships that the first two pleas in this case entirely fail, and that the Court in Scotland were right—the Lord Ordinary in the first instance, and the Court of Session afterwards—in holding that there was no ground for sisting the proceedings, and that the claim must be tried upon its merits.

Then, my Lords, upon the merits of the claim this other plea is alleged (the fourth)—"The sale of the concession in question having been fraudulently made to the appellant's Company by the said firm of Peter Lawson & Son and individual partners thereof, for the purpose and in the circumstances condescended on, and the same having been annulled, the appellants are entitled to be reimbursed the sum paid therefor, with interest, all as contained in the appellant's claim, and the respondent should be ordained to admit the said claim accordingly." The fifth plea is, "The said concession having to the knowledge of the said Peter Lawson & Son, and individual partners, been at the date of the said sale liable to be forfeited, and having been subsequently declared void in respect of what had occurred prior to the said sale, the appellants are entitled to have repetition of the purchase price paid by them, and they ought to be admitted as creditors accordingly." Your Lordships will observe that those two pleas are both of them in terms founded upon what is alleged in the condescendence, and I have already referred to what is alleged in the condescendence and submitted to your Lordships, that it does not found a case for relief against Messrs Lawson & Son.

My Lords, to what I have said I have very little more to add, but I must call your Lordships' attention to another circumstance connected with the case. On the materials before your Lordships I own that it appears to me that if there were not those objections to the claim of the Phosphate Company to which I have already referred, there would have to be considered another very serious objection, arising from the delay which took place before any claim was made to rescind the contract in question. The contract is completed in the year 1871—I think in the month of May in that year; the claim to rescind it is made early in the year 1873. There are certain vague allegations as to the Company's having been in ignorance—there is an allegation that what first came to their knowledge was a communication from the Government of San Domingo which resulted in a notice or threat to forfeit the concession. Now, my Lords, upon that I must make this observation. Your Lordships find that from the middle of 1871, when the Company was formed, when they either took possession or were entitled to take possession of the concession and the place where it was to be worked, until the date of this communication from the Government of San Domingo, the matter was in the hands of the Phosphate Company themselves. It was for them to take care that they kept alive the concession by exporting the necessary quantity of guano. There is no evidence that they might not have done so. There is no evidence whatever as to what the state of the island was, or the quantity of guano or guanito that might have been obtained. In point of fact they did not apparently export the necessary quantity; but it would rather appear from the communication to which I have referred from the Government of San Domingo, that their claim to forfeit the concession was as much for what had been omitted to be done after the concessions came

into the hands of the Phosphate Company as for anything that was omitted to be done before that time; and it would appear to me that the great probability (to say nothing more) in the case, is that if the Phosphate Company had adhered to the terms of the concession from the time they came into possession, no forfeiture of the concession whatever as against them would have been made.

But apart from that, my Lords, I want to know what is the justification given for the delay in making any claim to rescind the contract? Everything which ought to have been known, or could have been desired to be known, with regard to the subject-matter, must have been in the hands of the agents of the Phosphate Company from the time that Company was formed. The documents are alleged by the bill —which is appended to the condescendence or referred to in the condescendence—to have been handed to the agents of the Phosphate Company. Now, my Lords, it has been said at your Lordships' bar, No doubt the agents of the Phosphate Company knew this—the directors and the secretary and the other officers knew it; but, it is said, they were all more or less implicated in what has been termed the conspiracy— the scheme to defraud the Company at large. My Lords, I have to look at the condescendence in the present case upon that subject, and I find in the condescendence no allegation whatever of that kind; and I find upon this condescendence a perfect blank as regards any explanation of the delay between the middle of the year 1871, when the Company was founded, and the beginning of the year 1873, when the claim to rescind this contract was made. Perhaps it is not necessary in this case to ground any decision upon this delay, but if it were necessary it appears to me that the delay alone would be fatal, upon the allegations with which we have to deal, to the case of the appellants.

My Lords, I will add one word more to what I have said. I have anxiously endeavoured in what I have laid before your Lordships to avoid even the appearance of expressing any opinion whatever upon the litigation which has been proceeding in the Court of Chancery in England. That litigation is not in any way before your Lordships. Your Lordships are called upon to pronounce an opinion upon the proceedings in Scotland, and upon those proceedings only. I say that, because your Lordships were informed by the learned counsel at the bar that the proceedings in England are not yet terminated, but are, at all events in some respects, the subject of a rehearing or appeal. It is therefore most important that your Lordships should not be supposed, upon pleadings which are not before you and upon evidence which is not before you, to give any opinion which might lead to misapprehension and misconstruction elsewhere. The opinion which I have ventured to express is formed upon the Scotch pleadings in the sequestration and upon the evidence taken in Scotland, and upon that alone.

I need not say, my Lords, after what I have expressed, that the advice which I shall offer to your Lordships is to affirm the interlocutors which are appealed against here, and to dismiss the present appeal, with costs.

Lord Chelmsford—My Lords, agreeing entirely with all that has been said by my noble and learned friend, the few observations which I propose to add will relate solely to the question as to the refusal to sist the proceedings by the Court of Session.

The appellants, the Phosphate Company, proceeded under the Scotch sequestration to make a claim of a debt from the bankrupts' estate upon the ground of their being liable to damages for being parties to a fraudulent transaction by which the Company were deceived into purchasing a worthless concession of a guano island in San Domingo. The trustee decided against the claim. The appellants appealed in regular course against the decision. The Court of Session considered all the circumstances of the transaction, and exonerated the bankrupts from being complicated in the fraud, and affirmed the trustee's deliverance.

The appellants assert that the Court of Session being informed that there was a proceeding in Chancery in England to rescind the sale and to make the bankrupts and others liable in damages to the whole extent of the purchase-money, the Court of Session ought to have sisted the proceedings until the determination of the Chancery suit. The appellants hardly go the length of saying that the Court of Session was bound to sist the proceedings, but only that they should, in the exercise of a just and proper discretion, have done so. But the Court having regular possession of the proceedings, there was no reason why they should hold their hands until it should be known how the English Court would deal with the suit before it. They were competent to decide whether the trustee had properly rejected the claim, and, fully examining the evidence and all the circumstances, they determined that if there had been a fraud committed there was no evidence to show that Messrs Lawson were implicated in it, in which I think they came to a right conclusion. This certainly constituted a sufficient reason against remitting the case to another forum, and for affirming the deliverance of the trustee.

Lord Selborne—My Lords, I am of the same opinion. I take it to be quite clear that the Scotch jurisdiction in a Scotch bankruptcy is exclusive, and that when in an Act of Parliament provision is made, as it is made, for establishing claims upon which the dividends cannot yet be uplifted according to law, that must *prima facie* mean according to the due course of law as that would be understood in the Courts of Scotland. I am far from saying that there might not be cases imagined in which, from the nature of the subject in litigation, or other circumstances, a proceeding in a foreign Court might be regarded by the Courts in Scotland as a satisfactory way of ascertaining the legal rights of parties; as, for example, when, according to the nature of the contract between them, some foreign law was to determine those rights, it might in that case well be considered that the country whose law was in question would in its own courts be best able to inform the Courts in Scotland of the proper application of their law to the facts of the case. Again, if a claim depended upon a joint cause of action only against a bankrupt in Scotland and other persons who were in Eng-

land, and if there were pending a suit or action in England against those joint parties, some of whom would not be amenable to the Scotch jurisdiction, I am not prepared to say that the Scotch Courts might not be proceeding in a very proper manner in desiring to see what the result of that action might be before proceeding themselves to determine the claim. But in any case, even if that course should be taken, and properly taken, the ultimate determination of the claim, with or without the benefit of the materials afforded by the adjudication of a foreign court, must be with the proper forum of bankruptcy in Scotland.

At the most, therefore, it can be no more than a question of judicial discretion, and for my part I think the proposition one very difficult to follow which the appellants are obliged to advance, and which really is this—that where the demand, though several against the Scotch bankrupts, is made in respect of transactions in some of which they and others are implicated, and in others of which others perhaps and not they are implicated, but which are such as may be considered as against all the parties concerned in them, by an English Court in an English Chancery suit, that on account of the very intricacy and number of the questions which from the nature and from the proceedings in the Court of Chancery in England may be combined in one suit, for that very reason it is more consistent with justice in a Scotch bankruptcy to sist the proof there until all the questions in the English Chancery suit against all the parties to that suit shall have been determined.

Now, I will not undertake to say that no case may exist in which the Court of Session in Scotland, exercising a judicial discretion, might think fit to take that course; but I do say that it is a proposition by no means self-evident, and not commending itself to my reason, that on those principles of judicial discretion as to which it is a miscarriage of justice not to follow them, the Court in Scotland, being informed that there is a Chancery suit pending in England against the trustee of a Scotch bankruptcy and a dozen or twenty other persons, involving such a number of issues as were in question here, are to delay the administration in bankruptcy as between all the persons interested in that administration in Scotland until that English suit has been brought to its conclusion. Happily we live in times in which, even if that proposition were advanced, it might still be hoped that the delay might not be more than two or three years, or perhaps four or five, if the matter were ultimately brought to this House for determination. But we all know that if a proposition be sound in point of law it must have been equally as sound thirty or forty or fifty years ago as it is at the present time; and I need not remind your Lordships of the length and nature of the delay which might have occurred in the winding up of a Scotch bankruptcy if such proceedings had occurred then.

My Lords, I do not say that the Court of Session in Scotland might not, if they had thought fit, have delayed this proof, but in the exercise of such discretion as they have they determined not to do so. They determined that the merits should be gone into upon regular pleadings and regular proofs before them, which has been done; and I can hardly conceive a greater miscarriage of justice than it would be if, after a complete suit has been instituted and fought out to the end on pleadings and proofs in Scotland for the purpose of determining this question between these parties, your Lordships were now to turn round upon a point of discretion and to say—All that is to go for nothing; there ought to have been a sisting of the proceedings in the Court of Session; the Court of Session must take into consideration what has been done in the English suit; after being informed of the decision of the English Courts, which perhaps have not yet considered that suit, and ascertained whether or no those proceedings are final, they must then determine whether or not they are to bind them in Scotland; and whatever may be the result of any such consideration, all that has yet been done in Scotland is to go for nothing. My Lords, I am happy to find that none of your Lordships are of opinion that it is our duty to take that course.

Then I come to the case upon the merits, and I entirely agree with your Lordships that we must deal with the facts before your Lordships *secundum allegata et probata*, as we find them upon this record. I am bound to say that, looking at the long inventory of the evidence, including a great number of documents which it has not been thought necessary to print in the printed case or appendix, I see no reason to suppose that there was any lack of material before the Court in Scotland for the necessary purposes of justice.

Well then, what is the case? The case, stated at the highest, is one of fraud. Now, supposing fraud were established *prima facie* upon this evidence against other persons, and not against the Lawsons, could your Lordships come to the conclusion that the Lawsons were to be answerable for the fraud of others unless they appeared to have personally derived a profit or benefit from that fraud? My Lords, I know of no principle on which in a Court of Equity, or in a Court administering equity, such a conclusion could be arrived at upon the facts of this case. It appears to me that, if there was any fraud, the Lawsons are not shown to have participated in it, or to have derived any benefit from it; because, my Lords, as far as benefit is concerned this appears sufficiently pleaded by them upon the condescendence, and established upon the evidence. In real truth it has been the foundation of part of the argument of the appellants at the bar, that before the final deeds or instruments were executed by which the concession in question was agreed to be sold to the Company, and conveyed, if that is the proper term, to the Company by the Lawsons before these transactions, although subsequent to the original contract of the 21st December 1870 with Engelbach, the Lawsons had by arrangements with Hartmont parted with all beneficial interest in the sale to the Company, and consequently when the Company carried that sale into effect the whole consideration passed into other hands, with the exception, in form only, of a certain number of shares which were transferred to them, but of which shares, upon the evidence, they were trustees only for Hartmont, and which afterwards were sold not for their benefit, but for Hartmont's. So stand the facts upon the evidence. Consequently, if the Lawsons were not personally participating in, or cognizant

of, any fraud, and were not personally *lucrati* by any fraud of others, I know no principle of equity by which they could be held responsible in repetition, or in damages for any such fraud. Now, my Lords, what is the fraud alleged? It is not that Engelbach, who was the purchaser as an agent for the Company, received an improper bonus or benefit; for no such case is even suggested in any part of the condescendence. And, my Lords, I may say that, although it does come out in the evidence that Engelbach did receive some benefit, even if it had been upon such a condescendence open to the appellants to prove the knowledge of that by the Lawsons, and to fix the Lawsons with a liability on that account, there appears to me to be nothing in the proof from which any such knowledge of the Lawsons of any such arrangement with Engelbach ought to be considered proved, or to be inferred. The absence of any distinct allegation upon the condescendence is a very ample reason why your Lordships should not take the statement which was made by Mr Ogle, that he understood the original arrangement to which the Lawsons were parties to have included this payment to Engelbach, as a proof of that fact. The Lawsons were asked no questions about it. Ogle said that whatever arrangements of that kind were made were not negotiated by him; and there is not upon the condescendence, as I have said, a suggestion of any such case. Under those circumstances, it appears to me that that part of the case must be laid aside entirely, as not really arising before your Lordships.

What is there in the rest? There is an allegation in the condescendence stopping considerably short, as I read it, of what is in the bill, although the bill is for certain purposes referred to in the condescendence. There is an allegation in the 8th paragraph that Hartmont and Begbie, Peter Lawson & Son, and Ogle "well knowing (as the fact was) that through their default the concession had become and was then voidable and liable to forfeiture, determined to form a joint-stock company for the purpose, amongst other things, that the Company should purchase the said concession from them at the price of £65,000. For this purpose they entered into communication with 'Engelbach and Keir,' and a provisional committee was formed, consisting of Begbie, Engelbach, Keir, and a Mr William Lewis Grant, for the purpose of carrying the said scheme and design into effect."

Your Lordships will observe that in that paragraph of the condescendence a statement is made inconsistent with the argument at the bar that the sum of £65,000 was arrived at by attributing £50,000 to the interest of the Lawsons and £15,000 to Engelbach; for the condescendence tells us that that sum was arrived at by Hartmont and Lawson and Ogle as partners, having in view their own benefit, and before they got into communication with Engelbach at all. So far, therefore, the statement in the condescendence negatives the argument from the amount of the purchase money which was ingeniously pressed upon your Lordships at the bar. But it alleges that, with the knowledge that through their fault the concession was voidable and liable to forfeiture, they determined to form a joint-stock company. In a later paragraph the bill in Chancery is referred to in a manner which may perhaps entitle the appellants to say that they ought to have the benefit in this appeal of any allegations in that bill, "a printed copy of which bill is signed by the deponent and the said justice of the peace as relative hereto, and is herewith produced and held as repeated *brevitatis causa*." That bill, my Lords, goes beyond the allegation in the condescendence in this respect, that it alleges the fraud—the substantial fraud which it sets out—to consist in the intentional concealment of the fact that the concession was voidable and liable to forfeiture from the persons who became shareholders of the Company. But the bill also says that the facts relative to the concession, and to the manner in which it had been worked, the concession itself, and all the other documents of title, were perfectly well known to the provisional committee, and in fact to all the persons who originally formed and constituted the Company, and who included other persons besides those who were the partners, or connected with them as partners.

My Lords, in the case before your Lordships of *Overend, Gurney & Co.* v. *Peek*, Lord Westbury, dealing with a somewhat similar state of allegation, expressly said, that as far as the facts were concerned, if all the facts were disclosed at the time to the persons forming the company and the persons who negotiated for the future company, and if, as was there the case, and as is the case here, on the very face of the memorandum of association the company was formed for the express purpose of making this purchase, whatever other point could be made, the point of concealment of those facts could not be made; that the company must be taken to have been formed with a full disclosure and knowledge of those facts. And accordingly we find that there was that disclosure, and that this purchase was expressly taken upon the footing of a covenant for title and with the knowledge of its voidable quality. Therefore, my Lords, all allegation of fraud on that ground falls to the ground; and, unless the point of failure of consideration by reason of the subsequent avoidance of that contract by the Government of San Domingo can be made good under, I think, the fourth plea in law, the whole case entirely fails.

But, my Lords, as to that the case stands thus:—More than a year after the concession had been acquired by this Company, they remaining in possession during the whole of the time, the Government of San Domingo write and communicate through their agent in this country to the Company a note, which is stated, I think, in the 54th paragraph of the bill and elsewhere in the proceedings. That note contains these passages—"The Dominican Government takes into consideration the fact that neither in the course of the year 1870," which was before the sale, "nor in that of the year 1871," the greater part of which was after the sale, "have the grantees complied with this most essential clause of their contract. In consequence thereof the Government has the right from this moment to declare the said grantees as having forfeited their concession. This right the Government reserves to itself, even in the event in which the minimum quantity stipulated for were to be reached by the grantees in future. The Government, however, is quite disposed to enter into fresh arrangements with the said grantees with the view of saving to

the latter the above forfeiture, provided the future interest of the Government is not prejudiced thereby."

Upon that statement it appears to me, my Lords, to be quite impossible to say that the ultimate forfeiture of the contract was due solely or directly or necessarily to defaults which had occurred before this sale took place; more especially as in the evidence of Mr Peach, the chairman of the Company (which is at page 137 of Record), he says distinctly that during the whole working by the Company the necessary quantity was not worked. And at page 139 he gives this evidence:—He is asked, "Though the concession had been subsisting all through last year, you would not have been bringing phosphate home?—(A.) We could not have brought home more when we have so large a quantity which we find no use for. (Q.) Suppose the concession had been handed over to you with the obligation on you to bring home 10,000 tons a year, must you not necessarily have stopped fetching it home?—(A.) Unquestionably. (Q) Therefore you have in reality, as a Company, lost nothing as yet from the San Domingo Government having stopped the concession?—(A) We have lost in this way, that the Company has got a bad reputation," and so on. The result is that they did not attempt to work the concession so as to keep it alive, and it would necessarily have been forfeited if the San Domingo Government had been disposed to insist upon those terms, even if at the time of the sale nothing had taken place by reason of which a forfeiture had been incurred.

My Lords, I do not inquire what may be the rights of the parties under that state of circumstances in any other point of view than that which is raised by this condescendence; but I do say, my Lords, that under these circumstances it is impossible that a case of repetition can be made upon the footing of failure of consideration and disappearance of the subject-matter to the contract.

Interlocutors appealed from affirmed; and appeal dissmissed with costs.

Thursday, June 22.

HARRISONS *v.* ANDERSTON FOUNDRY COMPANY.

(*Ante*, vol. xii. pp. 118, 579.)

Patent—Specification—Combination.

The specification of a patent for the invention of "improvements in looms for weaving" set forth that the invention consisted "in new or improved simple and most efficient modes of and arrangements of mechanism for actuating the set or sets of 'compound' and 'multiple' shuttle-boxes of looms for weaving striped, checked, or other ornamental or figured fabrics requiring two, three, or more shuttle-boxes and shuttles in each set." The specification proceeded to describe in detail, with reference to accompanying drawings, (1) a complete shuttle-box moving and holding mechanism, and (2) a complete pattern mechanism. No part of either of these was claimed as new, nor was any part disclaimed as old. The specification concluded by claiming, "first, the construction and arrangement of the parts of pattern mechanism and shuttle-box moving and holding mechanism generally for actuating the shuttle-boxes of power-looms, all substantially in the new or improved manner herein described and shewn in the accompanying drawings or any mere modification thereof." *Held* (*rev.* judgment of Court of Session) that the patent was *ex facie* valid in law.

This was a note of suspension and interdict by William & Henry Harrison, engineers at Blackburn in Lancashire, against the Anderston Foundry Company of Glasgow for interdict against the respondents infringing certain patents for weaving machinery obtained by Quintin and James Whyte of Glasgow in 1868, and assigned by them to the suspenders in 1871. The suspenders alleged that in manufacturing and selling power-looms fitted with mechanism for actuating the shuttle-boxes made according to a patent obtained by Mr M'Ilwham, the respondents' manager, in 1869, they (the respondents) were infringing the suspenders' patent of 1868.

The respondents pleaded, second, the alleged letters patent founded on by the complainers are null and void or invalid, in respect (1) the said Quintin Whyte and John Whyte were not the first and true inventors of the alleged invention described in the letters patent and specification; (2) the alleged invention was publicly known prior to the date of the letters patent; (3) the alleged invention was publicly used prior to the date of the letters patent; (4) the said alleged invention is of no public utility; (5) the said Quintin Whyte and John Whyte in the specification and relative drawings do not sufficiently distinguish between what is old and not claimed by them and what is alleged to be new and claimed by them. Third, Even assuming the said letters patent to be in all respects valid, the prayer of the note shall be refused, in respect the respondents have not infringed the said letters patent.

The invention bore to be "for improvements in looms for weaving." In the old hand-loom the shuttle was at first shot by the hand of the weaver, and afterwards by an instrument called a pick or pick-stick. When the weaver required to change the colour of his thread he did so by substituting for the shuttte he was using a new shuttle, which he placed in the shuttle-race. When the power-loom came into use it became necessary to change the shuttles without the intervention of the weaver. This was done by attaching to a vertical rod called the spear a box called the shuttle-box, which was fitted with compartments just large enough to receive each a shuttle. The compartments in the shuttle-box were open at each end, one end being towards the pick and the other towards the shuttle-race. The shuttle-box was moved up and down at the end of the spear so as to present the proper shuttle to the shuttle-race at each pick. The mechanism which actuated the spear with the shuttle-box attached was called "the shuttle-box moving mechanism;" and the mechanism which controlled the motion of the shuttle-box according to the pattern required was called "the pattern mechanism."

The suspenders' patent was for the purpose of obtaining greater rapidity in the process without los-