The pursuers appealed.

The defenders objected to the competency of the appeal, and argued—The appeal was incompetent, as the interlocutor appealed against was not a final interlocutor and did not fall within the exceptions allowed by section 24 of the Sheriff Court Act of 1853 (16 and 17 Vict. cap. 80), viz., sisting process, giving interim decree, and disposing of the whole merits of the case. This was not an interlocutor sisting process. It was really an interlocutor ordaining the pursuers to find caution, although incidentally there had to be a stay of proceedings. The mere wording of an interlocutor was not conclusive—*Watson* v. *Stewart*, February 24, 1872, 10 Macph. 494, 9 S.L.R. 295; *Maxtone* v. *Bone*, May 28, 1886, 13 R. 912, 23 S.L.R 645.

Argued for pursuers — The appeal was competent. This was really an interlocutor sisting process. There was a stay of proceedings and that was equivalent to sisting process. Actions could be sisted to allow of documents being stamped — Mackay's Manual, p. 265.

LORD PRESIDENT—A preliminary point here has been taken on competency. The action is one raised by a limited company, and the defender conceived that he was in a position to have the 69th section of the Companies Act of 1862 applied. The 69th section says—[*His Lordship read the section*].

In view of that plea the defender lodged a minute in which he averred in general terms that the company was in such a condition that the assets would be insufficient to pay his costs, and he followed up that general averment by certain specific averments as to the condition of the finances of the company. That minute was answered by the pursuers, and upon consideration of the minute and answers the learned Sheriff-Substitute before whom the case depended allowed the minuter a proof of his averments. That interlocutor was appealed to the Sheriff by the pursuer, and after hearing parties the Sheriff came to the conclusion that there was enough in the pleadings to fulfil the conditions of the 69th section, and he therefore pronounced this interlocutor—he recalled the interlocutor of the Sheriff-Substitute — "ordains the pursuers to find caution for the expenses of process, and sists procedure until such caution shall be found." Against that interlocutor the pursuers have taken an appeal to your Lordships' Court, and the competency of the appeal is challenged by the defenders upon the ground first of all that it is not a final interlocutor, and that not being a final interlocutor it does not fall within the exceptions which are contained in the Sheriff Court Act 1853, sec. 24—the exceptions to the rule of non-appealability. These exceptions are—sisting process, giving interim decree, and disposing of the whole merits of the case. Now it is true that the interlocutor does not say in so many words that it sists "process;" it says "procedure"; but I am clearly of opinion that in truth and fact this is an interlocutor sisting process and nothing else. And accordingly I think there ought to be an appeal allowed upon this matter. I am much moved by this consideration, that if this is not a competent appeal I do not know when the merits of this matter could be brought up, and as I think there would clearly be, as shown by the reported cases, an appeal in England, I am disinclined to think that a different result should be arrived at in this country and in England in working out section 69 of the statute. I am therefore of opinion that your Lordships should proceed to hear the appeal.

LORD KINNEAR—I am of the same opinion. On a consideration of the statute it seems to me that if the interlocutor be not an interlocutor disposing of the case it must either be an interlocutor carrying on procedure or else an interlocutor sisting procedure. I cannot imagine any third kind of interlocutor which neither goes on with the case nor stops the case. Now this is quite clearly not an interlocutor carrying procedure on, because it stops it. Accordingly I agree that the true meaning and effect of it is simply that the proceedings are not to go on until a certain thing has happened, and it is thus an interlocutor sisting process.

LORD PEARSON—I am of the same opinion also.

LORD M'LAREN was absent.

The Court held the appeal competent and proceeded to hear it.

Counsel for Pursuers and Appellants—Hon. W. Watson. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Defenders and Respondents—Graham Stewart. Agents — Davidson & Syme, W.S.

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*Tuesday, February* 6.

## FIRST DIVISION.

[Lord Ardwall, Ordinary.

## MACKINTOSH'S TRUSTEE AND ANOTHER *v.* STEWART'S TRUSTEES.

*Process—Reduction—Reduction of Decree—Perjury by Party—Res judicata—Competency of Action of Reduction.*

An action of reduction of a decree obtained *in foro* in a preceding action between the parties, or those whom they represent, on the ground simply that the party who obtained the decree committed perjury, is incompetent, inasmuch as no matter extrinsic of the matter of the preceding action is put in issue, and the question is *res judicata*.

Hugh Stewart, 56 Newington Buildings, Causewayside, Edinburgh, as trustee on the sequestrated estate of the late Galloway Mackintosh, tweed merchant, sometime in Elgin, and Mrs Marie O'Neill or Mackintosh,

his widow and executrix-dative, raised an action against John Henderson, agent, Bank of Scotland, Lockerbie, and James Charles Stewart, law-clerk, Lockerbie, testamentary trustees of the late James Stewart, solicitor, Lockerbie. In it the pursuers sought, *inter alia*, to have reduced an interlocutor pronounced by Lord Wellwood (Ordinary), dated 13th July 1893, and interlocutors pronounced by the Second Division of the Court of Session, dated 1st November 1893 and 17th January 1894, in an action raised by the deceased Galloway Mackintosh against the deceased James Stewart concluding for payment of £1000 as damages. The interlocutors sought to be reduced assoilzied the defender James Stewart from the conclusions of the summons in the said action and found the pursuer Galloway Mackintosh liable in expenses (£125, 11s. 10d.).

The pursuers also concluded for a sum of £1500 as damages.

The pursuers, *inter alia*, averred that the late James Stewart had procured and carried through collusively and fraudulently on 18th December 1891 a pretended sale of the furniture and effects belonging to the late Galloway Mackintosh, and had by intimidating other purchasers under pretext of his rights as a landlord, by employing bogus bidders, by making use of a decree obtained on a petition of sequestration for rent irregularly served, and otherwise, fraudulently possessed himself of such furniture and effects at a price largely under their real value; that on the facts becoming known to the late Galloway Mackintosh, he on 6th February 1893 raised the said action in the Court of Session to recover damages laid at £1000, but that by the interlocutors sought to be reduced the Court assoilzied the defender the late James Stewart, and found the pursuer the late Galloway Mackintosh liable in expenses, taxed at the sum of £125, 11s. 10d., on failure to pay which sum the late Galloway Mackintosh had been made bankrupt on 18th July 1896.

The pursuers further averred—"The said judgments were procured by the said James Stewart by the said corrupt devices and by false and corrupt evidence. From the date of the said action being threatened he fraudulently and corruptly set himself to devise and did devise the deception of the Court. The case of Mackintosh was supported by a number of witnesses, and their depositions are referred to, as well as Lord Wellwood's comments thereupon. Mackintosh's witnesses were contradicted only by Stewart. If Stewart had not tendered himself as a witness and given the false evidence he did give Lord Wellwood and the Second Division of the Court would have decided the said action in favour of the said Galloway Mackintosh, because Mackintosh and his witnesses would have been believed by the judge but for the perjury and conspiracy of Stewart. . . . James Stewart, however, knowing that the case must be decided against him unless he tendered himself, went into the witness-box in order to swear falsely that the material evidence given for Mackintosh was untrue, and to falsely invent other evidence, both of which things he did." . . .

The pursuers also made averments of particular statements made by the said deceased James Stewart in evidence, which they alleged were false and perjured.

The defenders, *inter alia*, pleaded—"(2) *Res judicata.* (3) The pursuers' averments being irrelevant, *et separatim* the action being incompetent, decree should be pronounced dismissing the same."

On 25th January 1905 the Lord Ordinary (ARDWALL) assoilzied the defenders.

*Opinion.*—"This is an action at the instance of Hugh Stewart, the trustee on the sequestrated estate of the late Galloway Mackintosh, and of Mrs Mackintosh, who is described as widow and executrix-dative to the said Galloway Mackintosh, and it is directed against the executors of the deceased James Stewart, solicitor, Lockerbie. But at the discussion in the procedure roll it was stated that the argument was to proceed as if the trustee alone were pursuer, and that the only claim insisted in by him was in respect of pecuniary loss to the bankrupt estate, and not for solatium for injury to the feelings or reputation of the bankrupt who died on 7th April 1897, the widow's interest being in any reversion that might remain after satisfying the creditors in the sequestration, if indeed there are any creditors. The summons concludes ultimately for damages, but as a necessary preliminary for reduction of certain interlocutors of this Court, by which the deceased James Stewart was assoilzied from the conclusions of a summons at the instance of the said Galloway Mackintosh, and the latter was decerned to pay the sum of £125, 11s. 10d. of expenses. It was on this decree that the sequestration of Galloway Mackintosh proceeded, and accordingly, if the trustee is successful in this action it would seem that the ground of his own title would be cut away, and recal or reduction of the sequestration might at once be obtained by anyone having an interest.

"It is not said, and it does not appear, that any part of the said sum has been paid, and the only damage now sued for in the action appears to be the sum of £200, being the alleged expenses incurred by the deceased Galloway Mackintosh in the former action, the expenses of the present subsisting sequestration, and the loss claimed in the former action in respect of the dishonest sale of the deceased Galloway Mackintosh's furniture, which was alleged to have cost £147, 17s. 3d., to have been improperly appraised at £41, and to have been improperly sold for £38, 10s.

"The dates are of importance in considering the case. The alleged illegal acts of the late James Stewart were committed in 1891; the former action was raised on 6th February 1893, and finally disposed of on 17th January 1894; the estates of Galloway Mackintosh were sequestrated on 18th July 1896; Galloway Mackintosh died on 7th April 1897. His widow, one of the pursuers in the present action, was notwithstanding

the sequestration appointed executrix-dative on 23rd July 1897. The act and warrant confirming the present trustee is dated as late as 18th July 1901. James Stewart died towards the end of 1902, and the present action was raised on 1st November 1904.

"The ground of reduction is that the decrees under reduction were obtained through the perjury of the late James Stewart.

"As a rule, the fact that perjury has been committed in the trial of any case is not a sufficient ground for reducing the judgment pronounced in such case (see *Lockyer* v. *Ferryman*, June 28, 1876, 3 R. 896, 4 R. (H.L.) 35; *Begg* v. *Begg*, 16 R. 550; and *Forster* v. *Forster*, January 21, 1871, 9 Macph. 445). It is maintained for the pursuer, however, that the above were all cases where the perjury was committed by witnesses other than the parties to the cause, and that in the present case the perjury of the defender in the former action being a fraud on his part forms a good ground of reduction in respect that the law will not allow a person to take benefit by his own fraud, and it is upon this principle that subornation of perjury, as distinguished from perjury, has been held to be a good ground of reduction of a decree following upon the trial in which it has been committed. I am of opinion, however, that the real distinction between perjury and subornation of perjury as a ground of reduction lies in this, that the former is committed in open court and that the judge or jury have thus an opportunity of deciding whether it is perjury or not, whereas subornation of perjury is a crime committed outwith the court, and as a rule is not exposed at the trial of the cause, and therefore is not an element entering into the decision of the cause. Accordingly, to allow decrees to be reduced on the ground of perjury would simply be opening the door to the re-trial of causes which had been heard and decided, and to which the plea of *res judicata* applies. The present is peculiarly a case for applying the rule against allowing decrees to be reduced on the ground of there having been perjury at the trial. Lord Wellwood's opinion in the case, which will be found in the reclaiming-note in the former action, and which is referred to by the pursuer on record, brings this very clearly out. He says—'Unfortunately here the evidence on neither side is free from objection. The whole truth has not come out, and I can say no more than that, in my opinion, the pursuer has failed to prove his case.' Then again—'I have anxiously considered the evidence in support of and in answer to these points, and have come to the conclusion that the pursuer has done no more than raise a case of suspicion. But it is not permissible to proceed on mere suspicion or surmise, however strong, and I do not think that on the evidence the charge is made out.'

"Again he says—'The most troublesome cases to decide on evidence are those in which, on certain points, the evidence on both sides is not trustworthy. But it does not follow that because, for instance, a defender's evidence is not to be believed on some points, the pursuer is necessarily entitled to succeed. In the present case, notwithstanding the doubt which I entertain in regard to parts of the evidence, I feel that I should not be justified in finding the charge against the defender proved upon the evidence presented to me.'

"His Lordship then goes on to point out that the evidence of damage is slight and unsatisfactory. I am therefore of opinion that in the present action the pursuer has not made out a relevant case for reduction."

. . . . . .

[*His Lordship then dealt with a plea of mora, which, if necessary, he would have sustained.*] . . . . . .

The pursuers reclaimed, and argued—The decrees complained of should be reduced since they had been obtained by the perjury of one of the parties to the action. No one was entitled to benefit by his own fraud—*Begg* v. *Begg*, February 27, 1889, 16 R. 550, 26 S.L.R. 402; Sir George Mackenzie's Works, vol. i, p. 42. An allegation of subornation of perjury entitled to inquiry—*Forster* v. *Forster*, January 21, 1871, 9 Macph. 445, 8 S.L.R. 319. The perjury of a party to an action was not to be distinguished from subornation of perjury. The case of *Snodgrass* v. *Hunter*, November 8, 1899, 2 F. 76, 37 S.L.R. 60, was not in point since there the question was of a single act of perjury by a witness—here of a fraudulent scheme by one of the parties, of which evidence was only obtainable after the death of the author. The interlocutor of the Lord Ordinary should be recalled and a proof allowed.

Argued for the defenders and respondents—Though subornation of perjury might be a good ground for inquiry, none was averred here, and the perjury of a party was in no wise different from that of any other witness and did not form a ground for an action of reduction—*Forster* v. *Forster* and *Snodgrass* v. *Hunter*, *ut supra*. To entitle to inquiry new evidence extrinsic to the matter in issue at the former trial and then unobtainable must be adduced—*Lockyer* v. *Ferryman*, March 6, 1877, 4 R. H.L. 32, June 28, 1876, 3 R. 882, 13 S.L.R. 572; *Phosphate Sewage Company* v. *Molleson*, July 8, 1879, 6 R. (H.L.) 113, 16 S.L.R. 822; *Flower* v. *Lloyd*, 1878, L.R., 10 Ch. D. 327. The doctrine of *res judicata* was conclusive against the pursuers in the present case. On the effect of a judgment obtained by fraud the *Duchess of Kingston's* case 2 Sm. L. Cas. 713 was also quoted. (On *mora* counsel referred to *Assets Company* v. *Bain's Trustees*, June 5, 1905, 42 S.L.R. 835, and January 13, 1903, 6 F. 676, 41 S.L.R. 517.)

At advising—

LORD KINNEAR—This is an action at the instance of the trustee on the sequestrated estate of the deceased Galloway Mackintosh and of his widow and executrix, against the executors of James Stewart also deceased. The conclusions of the summons are for damages for a fraud by which Mackintosh

is said to have been injured, and as a necessary step towards that conclusion, for reduction of a decree of absolvitor, with expenses, obtained by Stewart in an action on exactly the same grounds which was brought against him by Mackintosh while they were both in life. The first pursuer, Mackintosh's trustee in bankruptcy, sets out in the condescendence that the sequestration was awarded on the petition of Stewart, founded upon an expired charge for payment of the amount contained in the decree under reduction, and the Lord Ordinary observes, with apparent justice, that if the action was successful the pursuer would as a consequence of his success cut away the ground of his own title to sue. But he is not the sole pursuer, and in the meantime the sequestration stands; and although there is a plea to title it was not argued that the action should be dismissed on this ground. I think therefore that we may consider and dispose of the case, as the Lord Ordinary has done, on its merits.

The action in which Stewart obtained the decree which it is now proposed to set aside was, as I have said, an action of damages on the ground of fraud; and the fraud alleged was precisely the same as that alleged in the present condescendence. In both cases it is averred that Stewart having by some not very intelligible means, with the aid of certain persons whom he induced to abet his fraudulent designs, obtained the control of certain judicial sales of furniture belonging to Mackintosh, succeeded in excluding honest bidders and in procuring a sale to himself at nominal prices. Without examining these averments in detail, it is enough to say that a record was closed in the first action and a proof allowed, and that on a careful consideration of the evidence the Lord Ordinary (Moncreiff) held the fraud not proved and assoilzied the defender, and that this judgment was affirmed by the Second Division. The pursuers now desire to set the judgment aside and to try the case over again on the allegation that the defender Stewart, now dead, who was examined as a witness, perjured himself in the witness-box, and so procured a wrong decision by a fraud upon the Court. The general rule may be stated in the words of Lord Justice James in the first case of *Lloyd* v. *Flower*, that a judgment which has been obtained in an action fought out adversely between two litigants *sui juris* and at arm's length cannot be set aside by a fresh action on the ground that perjury had been committed in the first. This is in accordance with many authorities, but it is enough to cite the judgment of Lord Cairns in *Lockyer* v. *Ferryman*—"I must say that I think the observations of Lord Gifford in the Court of Session are perfectly well founded that in every case where witnesses are called before a tribunal which is to judge of the facts spoken to by those witnesses, it is for that tribunal to say whether it believes or disbelieves them; if it believes the witnesses it is not for the defeated party afterwards to say I assert that those witnesses spoke what was not true, and on my assertion that they spoke what was not true I ask as a matter of right that there should be a new trial before another tribunal so that I may take my chance of what that other tribunal may determine upon what is deponed to by the witnesses. My Lords, there would be no end to litigation if that were held to be a sufficient and relevant ground for the reduction of a former decree."

But it is said that the present case is distinguishable on the ground that the perjury alleged is that of the defender himself, and the argument, as I understand it, was that a judgment obtained by the perjury of the successful party is in exactly the same position as a judgment obtained by subornation of perjury, and subornation of perjury has always been held to be a relevant ground of reduction, because no one can be allowed to benefit by his own fraud. I have no doubt that a sufficiently specific averment of subornation might be relevant to support a reduction; but the distinction between a case of that kind and a case founded only on the allegations of the falsity of the evidence given at a former trial, is not that there is fraud in the one case and not in the other. There is fraud in both. But the true distinction is that in the one case the question of fraud has been already tried and decided, and in the other an entirely new issue is raised, on which no decision has yet been given. The principle is that of *res judicata*. A judgment may be set aside on the ground of fraud, if the facts alleged to constitute fraud were not in issue when the judgment was given; but the successful party cannot be put a second time to proof or disproof of the same issues as were raised in the original action. This is clearly brought out in the opinion of Lord Justice James in *Flower* v. *Lloyd*—"When a judgment has been obtained by fraud there is power in the Courts of this country to give adequate relief. But that must be done by a proceeding putting in issue that fraud and that fraud only. There cannot be a rehearing of the whole case until the fraud is established. The thing must be tried as a distinct and positive issue; you the defendant or you the plaintiff obtained that judgment by fraud, you bribed the witnesses, you bribed my solicitor, you bribed my counsel, you committed some fraud or other of that kind, and I wish to have the judgment set aside on the ground of fraud. That would be tried like anything else on evidence properly taken directed to that issue, and wholly free from and unembarrassed by any of the matters originally tried." The same view is stated in a somewhat different form by Lord Neaves in *Forster* v. *Forster*. His Lordship illustrates his opinion by reference to the obsolete use of reprobators, and says—"Reprobators were long in use in our law, but were not intended to give another opportunity of proving the reverse of the main issue. A litigant was allowed to protest and bring a reprobator on some collateral matter which at the time the parties were not prepared to try. But Lord Stair expressly says that the issue on which the parties have been convened cannot be retried on allegations

that the witnesses swore falsely." If a judgment is to be set aside, therefore, on the ground of fraud, it must be on allegations raising a distinct and separate issue on which a verdict may be obtained independently of any retrial of the question already decided. The proper order of procedure is clear. The pursuer must in the first place reduce the judgment he complains of on the ground of fraud, and it is only when that has been done that he can have his case tried over again. But the pursuer in this case simply seeks to revive the original dispute, and for that purpose repeats in his condescendence every single matter which was in controversy before. There is no reason whatever alleged for setting aside the judgment, except that on these matters the defender gave false evidence. But that was just the question the learned Judge had to decide in the former case, and on the pursuer's own showing his decision cannot be reduced without retrying the whole case. The proposal is not to reduce the judgment in order to retry the case, but to retry the case in order to reduce the judgment. The only averment which has any semblance of novelty is that the pursuer is now in a position to disprove a certain statement which was made by the late defender incidentally in the course of his cross-examination. He appears to have said that he heard of the sales in question by a telegram which he received from a person named; and the pursuer says he can now prove by the evidence of this person that this statement was false. I cannot see that, by itself, this would do much to help the pursuer's case. It would not prove that the judgment was obtained by fraud, because it appears from Lord Moncreiff's opinion that he did not give credence to that particular statement. But the conclusive answer is that the credibility of the defender's testimony on the one side and the pursuer's on the other was the very matter for decision in the former action; and it could not be decided otherwise in the present action by contradicting the defender on a single isolated point. The extent to which that should affect his credit cannot possibly be measured without trying the whole case over again. The importance of contradicting a witness may vary indefinitely. The contradiction may utterly discredit his testimony or it may leave him unshaken on all substantial matters. It seems to me therefore out of the question to propose that a judgment should be set aside on any such ground as that; and especially that it should be so set aside after the death of the defender, when the Court which *ex hypothesi* is to decide upon his credibility cannot have his testimony. This, however, was the point on which the reclaimer's counsel most strongly relied. Every other point resolved into a mere plea for a retrial. I am for adhering to the interlocutor of the Lord Ordinary.

LORD M'LAREN—I concur.

LORD PRESIDENT—I also concur in all that has been said. When the peculiarities of this particular case have been removed the question that is really raised in it will be found to be a simple one. Litigation would be perfectly endless if judgments were to be set aside and cases reheard *ad infinitum* merely on the ground that the evidence formerly given was false, and so it has long been settled that it is no ground for reduction of a judgment delivered *in foro* that the evidence on which it proceeded was contrary to fact.

Therefore if reduction of a decree is to be obtained on the ground of fraud, it can only be where the fraud is something extrinsic to what happened in the former trial, and whether that can be made out is an issue of fact. Subornation of perjury is a plain issue of fact, and can be proved by examining witnesses as to what actually happened. But when it is the evidence of one of the parties himself that is said to be perjured, how are you to proceed to prove that he suborned himself to commit perjury? That question is an inquiry into what happened in the man's own mind, and that could not be proved by anything extrinsic to the former trial, but only by drawing an inference from what actually happened in the former trial. In other words, it would amount simply to going back to the old question that was decided in the previous trial, and that as I have said is not competent. I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD PEARSON was not present.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Crabb Watt, K.C.—Forbes. Agent—D. Howard Smith, Solicitor.

Counsel for the Defenders and Respondents—M'Clure, K.C.—Mackintosh. Agent—John Stewart, Solicitor.

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*Tuesday, February* 6.

## FIRST DIVISION.

## GENERAL ACCIDENT ASSURANCE CORPORATION, LIMITED, PETITIONERS.

*Process — Petition — Remit to Reporter—Consideration of Report — Motion to Dispose of Petition in Single Bills—Intimation of Motion to be Made to Keeper of the Rolls.*

A party intending to move the Court to dispose in the Single Bills of an application which would in ordinary course be sent to the Summar Roll must intimate the motion to the Keeper of the Rolls, in order that the Court may have the opportunity of considering the matter beforehand.

On January 2, 1906, the General Accident Assurance Corporation, Limited, presented a petition to the Court under the Companies Acts 1862 to 1900, and especially under the Companies (Memorandum of Association)