Friday, June 8.

SECOND DIVISION.

[Sheriff of Lanarkshire.

ALLAN *v.* WORMSER HARRIS & COMPANY.

Jurisdiction — Reconvention — Foreign — Partnership.

In December 1891 an English firm sued a merchant of Glasgow in the Sheriff Court there, founding upon an agreement between them. In April 1893 the firm was dissolved, but the pursuers continued to maintain the action without notice to the defender. On 31st July 1893 the Sheriff decerned in favour of the pursuers, and on 26th September decree was extracted and the defender paid the sum decerned for.

On 11th August 1893 the merchant, founding upon the said agreement, sued the English firm as subject to the jurisdiction of the Glasgow Sheriff Court *ex reconventione*. The defenders denied the jurisdiction, and founded on the dissolution of the firm. Defences were lodged in vacation, and after procedure, the Sheriff on 1st November 1893 ordered proof of the dissolution of the firm, and being satisfied thereof, on 8th February 1894 he sustained the plea of no jurisdiction.

On appeal, *held* that the claims in both actions arose out of the same contract, that both actions were in dependence before the same court at the same time, that they were decided by judgments sufficiently contemporaneous, and that accordingly all the requirements necessary to found jurisdiction *ex reconventione* were present; and that the English firm, being properly cited in the second action, were liable, although dissolved, to answer the claim made upon them if valid.

Diss. Lord Rutherfurd Clark, who was of opinion that it is a condition of jurisdiction *ex reconventione*, that the second action must be brought while the first is in dependence for judgment.

In June 1891 James Andrew Allan, merchant, Glasgow, entered into an agreement with Wormser Harris & Company, stockbrokers, London, which was embodied in the following letter—"Gentlemen—In course of your acting for me as my brokers on the London Stock Exchange, and allowing me half of the commissions charged, as was arranged verbally, I agree to be responsible for half the losses that may arise through default of the person or persons for whom you act through me."

In December 1891 Wormser Harris & Company sued Allan in the Glasgow Sheriff Court to recover from him one-half of the losses arising on certain transactions on the London Stock Exchange through the default of Allan's principals. In said action they gave him credit for a sum of £67, 18s. 9½d. as commission due to him.

Upon 13th April 1893 the pursuers' firm was dissolved, and the following notice was posted in the London Stock Exchange:—

"Francis Levien, Esq., Sec. of Committee, Stock Exchange.

61 *Old Bond Street, and Stock Exchange, 13th April* 1893.

"Dear Sir—Kindly inform the members of the Stock Exchange that the partnership hitherto existing between us has been dissolved this day by mutual consent. All outstanding bargains will be settled by Mr Percy Wormser Harris at the above address under the same style as heretofore. Mr Harold Powers remains with Mr Arthur Wormser Harris as unauthorised clerk.—We remain, yours faithfully,

"ARTHUR WORMSER HARRIS.
"PERCY WORMSER HARRIS."

No other notice of the dissolution of partnership was given to the public. No alteration in the instance was made on the face of the proceedings in the action against Allan, and the pursuers continued to maintain their action without any notice to the defender.

On 31st July 1893 the Sheriff decerned in favour of the pursuers.

Within a few days of this judgment, and a month before its extract on 26th September, Allan raised an action of accounting in the Sheriff Court at Glasgow against Wormser Harris & Company as being "subject to the jurisdiction of the Court *ex reconventione*." He founded upon the agreement of June 1891, and averred that the balance of £67, 18s. 9½d. allowed him was erroneous, and that credit for various commissions and transactions was not given.

By warrant of the Sheriff on 11th August 1893 the defenders were cited by service on their agents Messrs Frame & Macdonald, writers, Glasgow.

Service was accepted by defenders' agents upon 14th August, but as it was in vacation defences were not lodged until 22nd September.

The defenders pleaded—"(1) No jurisdiction. (2) All parties not called." They founded on their dissolution of partnership.

Upon 26th September the decree by Sheriff Berry in the first action was extracted. On 29th September Allan, under a charge, implemented the decree against him, and paid the pursuers of the action the sum which had been found due and the taxed expenses.

In the second action upon 1st November the Sheriff-Substitute (GUTHRIE) pronounced this interlocutor:—"Ordains the defenders to produce evidence of the dissolution of the firm of Wormser Harris & Company within six days, and continues to the procedure roll of 9th November current."

The defenders led evidence to the effect that by the notice of dissolution the firm of the defenders was *de facto* dissolved.

Upon 8th February 1894 the Sheriff-Substitute sustained the defenders' first plea-in-law, dismissed the action, and decerned, with expenses, &c.

"*Note*—Reconvention founds jurisdiction when the action in which it is pleaded is between the same parties as those in the action on which it is based. Here the firm of Wormser Harris & Company of London, being pursuers in an action in this Court, was dissolved in April 1893 while that action was still pending. It was not taken out of Court till 26th September, when a decree against the present pursuer in their favour was extracted. This action by Mr Allan against them was brought into Court in August, having been served on the defenders' agents, who were agents for the pursuers in the other action. No objection to the service has been stated, and the defenders have appeared and defended.

"From the evidence which has been taken I am prepared to hold that the former firm was dissolved at the date mentioned. Possibly the new firm, which bears the same name, has taken up the assets and liabilities of the former, and got and holds the decree in the former action, but there is no evidence of this. It only appears that the new firm intimated that it would settle the claims against the old by members of the London Stock Exchange, and, so far as the late action in this Court is concerned, the person who really carried it on may be the partner who retired, or some third party, liquidator. There is therefore considerable difficulty, as the case has been argued on the proof, in sustaining the jurisdiction, for it is not clear that the Wormser Harris & Company, who are called, and on whom the action was served, are the same Wormser Harris & Company, or have any interest in the former action.

"Reconvention, however, is an equitable plea, analogous to or rather an extension of the principle of compensation. This is clearly laid down as the origin and ground of the rule in the leading case of *Thomson* v. *Whitehead*, and where, as here, the *actio conventionis* is finished and extracted before the plea is stated at the bar, when consequently the questions between the parties cannot be tried contemporaneously, or so that the decision on the *actio reconventionis* can have any effect on the decision on the other, the reason of the rule, and therefore the rule itself, ceases to exist. The judgment of Lord Rutherfurd in *Baillie* v. *Hume*, 15 D. 267, appears to be inconsistent with this view. That judgment, however, is reported without any note by that very eminent judge, and the circumstances on which it was based are imperfectly known from the report. It is, moreover, anterior to the judgments in *Thomson* v. *Whitehead* and *Longworth* v. *Yelverton*, 7 Macph. 70, and I think is inconsistent with the principles fully explained here. I do not think that the equitable principles on which reconvention is founded were extended by *Morrison and Milne* v. *Massa*, 5 Macph. 130, although that case supplies us with a novel application of the rule. A dictum of Lord Deas in that case, quoted by Mr Mackay, Manual, p. 62, appears at first sight to extend the principle beyond what is warranted by the judgments in the cases cited, and, when read without regard to the facts with reference to which it was spoken, beyond the meaning of the Court which was giving judgment. His Lordship says that the principle of reconvention is 'that a person is not entitled to take the benefit of the jurisdiction of our Courts and at the same time refuse the jurisdiction of the Court in relative matters.' This is quite true, but it was not the intention of the judges, all of whom had taken part in deciding *Thomson* v. *Whitehead*, to ignore the definition of the rule by that case, or to make the principle of reconvention operate as a personal bar to a challenge of the jurisdiction of our Courts by any man who had ever applied to them for relief. On the contrary, there was the most obvious justice in applying the rule in the case of *Milne* v. *Massa*, and so little question of convenience or of the possibility of a contemporaneous trial, that it was wholly unnecessary to refer to that point. Here that is the thing mainly to be considered. For a few weeks or days there was a technical concurrence of two actions between parties who, for this purpose, may be assumed to be the same parties litigating about relative matters. But before the question of jurisdiction could be stated at the bar that concurrence had ceased beyond the possibility of being restored. I therefore think that there is no jurisdiction against the defenders."

The pursuer appealed, and argued—The jurisdiction *ex reconventione* was an equitable jurisdiction, and was founded on the principle that when a foreigner sought the Scottish Courts for aid, he could not refuse to answer to the Scottish Courts in any question that arose relative to the same subject-matter. Here that was evidently the case, because the pursuers in both actions founded upon the same agreement; they were indeed merely seeking to enforce against each other that portion of the agreement which was in their favour respectively. It was, however, admittedly necessary, upon the authorities, that there should be a depending process between the parties when the action of reconvention was raised, and there was a depending action here. The second action was brought before judgment in the first was extracted. A process in that position was still depending, at least to the extent of permitting an action of reconvention to be brought—*Baillie* v. *Hume*, December 17, 1852, 15 D. 267. That was merely an Outer House decision, but it must have proceeded upon that ground. The other cases on this subject were—*M'Ewan's Trustees* v. *Robertson*, March 8, 1852, 15 D. 265; *Longworth* v. *Yelverton*, November 5, 1868, 7 Macph. 70; *Ord* v. *Barton*, January 22, 1847, 9 D. 541; *Morison & Milne* v. *Bartolomeo & Massa*, December 8, 1866, 5 Macph. 130; *Barr* v. *Smith & Chamberlain*, November 18, 1879, 7 R. 247. The only difficulty that arose was from certain *dicta* in *Thomson* v. *Whitehead*, January 25, 1862, 24 D. 331. The judgment in the last case was founded solely upon the fact that the two actions were of entirely different character. If, then, the original action was still pending

when the second one was brought, the fact that no appeal was taken, and the original decree implemented by the defender in that action, did not make the second action fall, because the test of competency must be, whether there was a competent jurisdiction at the time of raising the action. The pursuer in the action *ex reconventione* sued the firm which had sued him, and which had taken payment of the money from him, although at that time the firm was dissolved. No notice had been given to the pursuer or the public that the firm had been dissolved, and as they had entered appearance and defended the action, they could not now escape under the plea that they had not been properly cited.

The respondents argued—In order that an action could be raised *ex reconventione*, it was necessary that an action should be already pending between the parties, and that both actions could be contemporaneously or nearly contemporaneously decided. In this case there was no such action. The original action by Wormser Harris & Company against the present pursuer Allan had been decided by a final interlocutor of the Sheriff before the action by Allan was raised at all. It was said that although the action had been finally decided, the days for appeal to the Court of Session had not expired and the judgment had not been extracted; that did not alter the case, because no more could be done in the case in the Sheriff Court, and the extract of the decree was immaterial to the point, as that was only to enable the holder of the judgment to make use of it. The real test of whether an action was still pending between the foreigner and the pursuer was whether the foreigner was still *in petitorio*. Here the foreigner had got decree, so he was not asking anything, and that was the real distinction between the case of *Baillie* v. *Hume*, cited *supra*, and this case, because in the original action there the foreigner was the defeated party, and so was still *in petitorio*. Even in the strictest sense no action was pending between the parties, because on the first occasion the defenders had of stating their objection to the jurisdiction, viz., the time for lodging the defences, the decree had been extracted, and Allan had afterwards implemented it, so that the whole action was at an end, and the two actions could never be decided contemporaneously. The pursuer Allan was suing a dissolved firm, and while it might be held that the partnership existed for all the purposes of winding-up, and so could be competently sued, it was necessary to call all the partners of the firm whether the firm was cited under its company name or not—*M'Naught* v. *Milligan*, December 17, 1885, 13 R. 366.

At advising—

LORD JUSTICE-CLERK—In this case the question is whether the defenders being outwith the jurisdiction of the Scottish Courts, there is jurisdiction *ex reconventione* in respect of an action raised by them against the defender within Scotland.

The circumstances are these—the pursuer of this action was sued by the defenders before the Sheriff of Lanarkshire for £630, 10s. 6d., as being the proportion of loss falling upon him under an agreement with them by which he was to receive a share of the commission of the other party on Stock Exchange transactions done by them for clients introduced by him, and in respect of which share of commission he undertook to be liable for one-half of any losses caused by default of such clients. In that case the Sheriff-Substitute decerned, and his judgment was affirmed by the Sheriff on 31st July 1893. The pursuer within a few days of this judgment, and a month before extract, served the present defenders with the present summons, and the sum sued for in it is a balance said to be due to him off commissions on the same transactions, service of this summons being accepted on 14th August, a month and two days before extract of the judgment in the first case.

The question which thus arises is one of no little difficulty. It is one on which I do not think that we have any sure or certain guidance from past decision. There certainly is no case which can be held conclusively to rule the present, for however instructive the very full exposition of the law may have been in the case of *Whitehead*, its decision did not depend upon any principle applicable to this case, for it was decided upon the nature of the case itself as being one which could not be sustained as a ground for the application of the rule, and not upon the time at which it was raised. On the other hand, although the case of *Baillie* v. *Hume* was almost if not altogether the counterpart of the present, it was not a decision in the Inner House, but only by a Lord Ordinary, the parties having acquiesced.

Certain of the elements necessary to found jurisdiction *ex reconventione* exist in the most complete form in the present case. First, there is the element of association between the subject-matter of the two actions. For here the matters in dispute in both causes actually take their origin out of the identically same transactions. They are claim and counterclaim in regard to the business following upon the same agreement. Further, as I think, the action of reconvention is brought into Court while the *actio conventionis* was still a depending process before the same Court. But it is as regards the requirement expressed by the late Lord President Inglis in *Whitehead's* case that the two actions must be capable of being terminated by a single sentence, or by two sentences contemporaneous or nearly contemporaneous, that the question arises. It is the latter alternative of that head which is alone in question. Now, I make this remark upon these words—"nearly contemporaneous"—that they are words which are by no means of the character of words of definition, and the Lord President, who used them, did not give—as in the case he was dealing with it was unnecessary to give—any de-

finite statement of what they were intended to cover. It is plain that they must involve some degree of uncertainty, and I cannot but think that the absence of definiteness must have been intentional, for the late Lord President, where he saw his way to state a matter of law on distinct lines, did so, as for example, where he thought that a line of demarcation as between competent and incompetent or the like could be laid down. But he adopts the somewhat vague phrase of Bartolus as all that can be safely laid down on this point. The word "nearly" as applied to contemporaneous progress or decision of cases before a court seems to admit of a very considerable margin, just as the word "summarily" may not suggest the same speed in one court as it does in another. Such a word may reasonably be read as referring to different periods of time. "Nearly contemporaneous" may mean days in one state of circumstances, and weeks or months in another. The speed or slowness with which the business of the same court is conducted at different periods may make a narrower or wider reading reasonable. It must be a question of circumstances. An excellent illustration of the impossibility of justly drawing any line approaching hardness and fastness is illustrated in this present case. It so happened that the time of the raising of this action was almost simultaneous with the commencement of a long vacation of Court, and thus a case which might possibly have come to final judgment in a few weeks, was not taken up by the Judge for about three months. And again a delay of three months was caused by the allowing of an incidental proof, which practically added nothing to the materials for disposing of the case.

All this seems to me to make it clear how inequitable it would be to settle the question what is covered by "nearly" contemporaneous upon what may happen in a particular case in the way of innocent delay or of procedure occupying time. The true reading of the rule seems to me to be that the case which is raised against the foreigner in the Court in which he has sued another, must be such that there is nothing in it which makes a nearly contemporaneous decision impracticable, and if that be so, then further, that an action such as this, relating to the very same transactions and between the same parties, is one which fulfils this as well as the other conditions, being raised at the time at which it was, viz., before the first case was out of Court.

If I am right in this, then what must be looked to in considering the question is the state of matters at the time when the *actio reconventionis* is raised, and doing so here, I hold that the pursuer was then in a position to maintain that his case fulfilled all the named conditions formulated by the late Lord President as tests of the right of a pursuer in an *actio reconventionis*.

I said before that the case resembling this one which was to be found in the books could not be considered a binding authority. But I may be permitted to say that having formed the opinion I have done with much diffidence, and feeling that confidence would be presumptuous, I cannot but have some satisfaction in knowing that the view I have come to is the same as that held by one so eminent as the late Lord Rutherfurd.

There is another question in the case which does not appear to me to be attended with anything like the same difficulty. It is maintained by the defenders that as their firm was dissolved in 1893, the pursuer in calling into Court the same firm as were pursuers in the first action, has for this reason failed to bring into Court the same parties as were pursuers of that action. I do not think this contention can receive effect. The pursuers in the first action remained the pursuers down to and past the time when they were summoned in the *actio reconventionis*. No alteration was made in the instance on the face of the proceeding. They continued to maintain their action without any notice to Mr Allan. It was these pursuers who were called in the new action. And as the firm, though dissolved, would still continue for settlement of existing liabilities, of which the claim in this case, if well founded, is one, I see no good ground for holding that if the action is well laid otherwise, it can be thrown out on that ground.

LORD YOUNG—I am of opinion that the Sheriff has jurisdiction against these English defenders, and that on the doctrine of reconvention which is a doctrine of the common law. It is not established by any statute; it is nothing but a rule of the common law resting on considerations of good sense and expediency as to what will be best for the convenience of both parties.

The rule itself is an exception to the general rule *actor sequitur forum rei*. That also is a rule of the common law founded upon the same considerations of good sense and expediency as the exception to it, and simply means that if a person wishes to sue another he must sue him in his own country and under the laws of the country in which he resides. There are exceptions to that rule, and this is one of them, and it amounts to this—If a foreigner is suing in this country a person who is subject to the Scottish Courts, upon some matter in dispute between them, the other, the Scotsman, may sue the foreigner in the same Court upon any dispute arising out of the same matter as the original action. He is not following the *reus* into another country, he is arraigning him in the same Court as the *reus* sued him in. Now, I think I must hold that where the considerations of good sense and expediency upon which this rule is founded apply, I know no other rule which prevents the doctrine of reconvention being held good.

Now, do these considerations which must apply to the case exist here. I am of opinion they do, and the only reason that was urged why the doctrine of reconven-

tion should not be held good, was that there was a technical objection. It was said that if the original action had been heard out, a judgment given, and the case decided, that then there is an end of the matter and the rule *actor sequitur forum rei* must apply. If these considerations of good sense and expediency, of which I have spoken, cease to exist when the interlocutor giving judgment in the case is pronounced, that will be so, but if these considerations do not cease to exist at that time, then I do not think that the doctrine of reconvention is inapplicable to give the relief which it would admittedly have been able to give if the interlocutor had not been pronounced. I am of opinion that these considerations of good sense and expediency do not necessarily cease when the Sheriff has pronounced his judgment. The case was argued to us by the respondents on the footing that these considerations did not cease to exist during all the time that the proof was being taken, when the case was being argued, and when it was at avizandum, but that they did cease to exist when the Sheriff put his name to the interlocutor.

At this point we may see how that rule would apply in this particular case.

The original action was brought by Wormser Harris & Company against James Allan, the appellant in this action, upon a written contract between the parties in which each had certain rights and obligations set forth. They sued Allan on the ground that in their view of the contract there was a certain sum due to them under it by him. They bring their action some time before 11th December 1891, and it has a somewhat slow course, because it is not disposed of until 31st July 1893. I suppose that the action of reconvention could have been brought, and all the considerations of good sense and expediency would have been in existence up to the date when the Sheriff signed his interlocutor upon 31st July 1893, but the respondents' view is that they ceased to exist whenever he did sign it. Now, I admit these views do not seem to me to be weighty, nor to be so sensible of being practically worked out as to be proper for the foundation of our decision in such a practical matter as we have here, viz., whether it is expedient in view of the considerations of good sense and expediency upon which this rule of the common law is founded, that this action of reconvention should be allowed to proceed or not.

I pointed out during the course of the discussion that the defender's observation of what appeared to be the leaning of the Sheriff's mind in the original action, might very well be the ground for his bringing the action of reconvention to vindicate what seemed to him to be his rights under the original contract. The defender might well say to himself, "Well, this pursuer has brought his action against me in the Sheriff Court of Glasgow; I have heard him explain what is his view of our obligations under the contract towards each other, and I have seen the inclination of the Sheriff's mind as to our respective positions; I will convene him in the same court to recover what is due to me under the contract, and will urge against him the same obligations he has urged against me." I think it is right that all the cases between the parties arising out of the same subject-matter should be tried before the same court, and I cannot agree to the view that the considerations of good sense and expediency, which lead me to think that it is right these actions should be tried in the same court, cease to exist whenever the Sheriff signs the interlocutor in which he gives judgment in the original cause. No doubt considerations of time may arise, and even when the original case has been decided there may be considerations of time. The considerations of time may make these views inapplicable to any case, and then I should not act upon them. That would be a matter within the discretion and intelligence of the Court—and I think we would be able to consider the circumstances of each case—but I think that it would not be expedient to lay down any stern or fixed rule which would make the rule applicable to one point of time, and not after that.

If we were going to do that, I think that a safer rule would be to hold that the rule applies until the case is taken out of Court, for then the one party is not convening the other in the Court in which the original action was raised.

I believe this matter has been affected by recent legislation. Formerly no extract of a decree could be given until the question of expenses had been disposed of. Now, by statute there may be extract of the decree after the merits have been disposed of, although the expenses have not been paid, but the parties still remain convened before the Court. There might, for instance, be an appeal to the Court of Session, but that would be an appeal in a Sheriff Court case in the Court of Appeal, and the cause might be remitted back to the Sheriff Court, and even in a discussion upon the question of expenses there is that convention upon which the reason and expediency of the rule is founded.

Now, in this case there was no extract until September, and this action we are considering was brought in August so that the new action was in existence before the original one was taken out of Court.

On these grounds I am of opinion that this case is one for the application of the rule that when a foreigner has sued a Scotsman subject to the jurisdiction of the Scottish Court he is liable to be sued in the Scottish Courts upon any question arising out of the same subject-matter as that upon which the original action is founded, and that there are in existence here all the considerations of reason and expediency upon which the rule is founded.

LORD RUTHERFURD CLARK—The respondents, who are domiciled in England, raised an action in the Sheriff Court of Lanarkshire against the appellant. It was founded on a contract into which the respondents and appellant had entered. On 31st July 1893 it was finally decided by an interlocutor under which the appellant was

decerned to pay the sum concluded for as restricted by minute, and was found liable in expenses.

On 27th September 1893 the Sheriff decerned for the expenses, and on the 29th of the same month the appellant implemented the decrees by paying the sums due under them.

On 11th August 1893 the appellant raised the present action in the same Court and on the same contract. Defences were lodged on 17th September. A plea was stated against the jurisdiction of the Court which did not and could not in ordinary course come under the consideration of the Sheriff until a date later than 29th September, when, as I have said, the decree of 31st July 1893 was implemented. The Sheriff sustained it, and we have now to consider whether his judgment is right.

The sole ground of jurisdiction is reconvention. The appellant contends that jurisdiction exists, because his action is brought on the same contract as that on which he was sued, and because at the time when his summons was served the action at the first instance of the respondents was still in dependence, inasmuch as the judgment of the Sheriff had not been extracted. There is no doubt that there would have been jurisdiction if the appellant's action had been brought before the other was decided. The question is, whether the final decision excludes jurisdiction *ex reconventione*.

It is not necessary to inquire whether reconvention is a source of jurisdiction. Assuming that it is, which seems to be the most favourable view for the appellant, it is settled by *Thomson* v. *Whitehead* that the jurisdiction is not universal. There is some uncertainty as to the matters which may be embraced within the *actio reconventionis*. But it is, I think, clear that reconvention is an equitable right, and I give it its broadest meaning when I say that it holds its place in our jurisprudence on the equity that a foreigner who is appealing to a Scottish Court must submit to the jurisdiction of that Court in such actions as his adversary may raise which are necessary to enable the Court to do justice between the parties. It is a remedy given in extension of a jurisdiction which is in the course of being exercised, in order that the admissible claims of the defender may be before the Court at the same time as the claims of the pursuer. I say "admissible," because the jurisdiction is not universal; it is limited to claims, which having a relation to those of the pursuer in the original action, may be usefully tried along with them. I say "at the same time" both because it is common ground that the *actio reconventionis* cannot be brought after the *actio conventionis* has ceased to be in dependence, and because the very purpose of the jurisdiction is to enable the Court to consider the claims of the litigants in relation to each other. These considerations lead me to the conclusion that it is a condition of jurisdiction *ex reconventione* that the second action must be brought while the first is in dependence for judgment.

When the Sheriff pronounced the decree of 31st July, his functions as a judge were at an end. Nothing remained for him to do except to decern for the expenses which he had found to be due, and this was a mere matter of course. An action cannot be in dependence for judgment after final judgment has been given. It may be in dependence in another sense. For instance, it is in dependence before extract in the sense that an appeal may be taken if an appeal is otherwise competent. But the function of the judge is ended, not by the extract, but by his own decree.

In the older process of the Court of Session the judgments of the Court were considered to be the warrants of the decrees rather than the decrees themselves. Bankton (iv. 36, 1) says—"Even the judgments which are the warrants of decrees are only interlocutors till the decrees are extracted by the clerk, for till then they are in the power of the judges and may be altered by them." When such a power existed an action necessarily remained in dependence in the fullest sense until the final decree was extracted. But it has long ceased and it is the rule that a judge cannot alter his judgment after it has been pronounced. It follows, I think, that though an action may until extract be in dependence for certain purposes, it cannot after final decree be in dependence for judgment.

I am not speaking of the power to correct *de recenti* errors which have occurred in the framing of the judgment. I assume that such a power exists in the Sheriff Court as it does in the Court of Session. But it exists only to the effect of enabling the judge to express in accurate form the judgment which he has already pronounced. His powers as a judge are at an end, though he is entitled to see that his judgment is correctly recorded.

It was argued that the Sheriff on being informed of the appellant's action might have prohibited the extract of his decree, and that inasmuch as he possessed this power, the respondents were subject to his jurisdiction in that action. I do not think that any such power exists. The decree belongs to the party who holds it, and it is his absolute right to enforce it in ordinary form. The Sheriff cannot review or alter his decree by staying execution, and by consequence he cannot stay execution in order to any such purpose. But were it otherwise, I do not think that the case of the appellant is advanced. It is not pretended that the Sheriff was bound to use the power, and I do not see how his jurisdiction can depend on the manner in which he exercises a discretion. Nor do I think that the appellant's action would furnish even a stateable reason for prohibiting the extract of the decree. A claim is no answer to a decree, and cannot be a ground for staying execution. If the parties before us had both been resident in Lanarkshire, a motion on the part of the appellant to stay execution ought in my opinion to have been at once refused. It could not fare better, because it was made to preserve or create a jurisdiction which would not otherwise exist.

To hold that the *actio reconventionis* may proceed when the *actio conventionis* is not in dependence for judgment is to act on a principle after the reason of it has ceased to exist. For the judge after final decree is in the same position as if the first action had never been brought. It seems to be a strange anomaly that there should be jurisdiction before extract, and no jurisdiction after extract, when the powers of the judge are the same in either case. They are non-existent. I can see no reason for the want of jurisdiction after extract, except that the first action is not in dependence for judgment, and the same reason applies with equal force when final judgment has been pronounced.

I may appeal to the authority of Voet, who seems to me to explain accurately the reason as well as the limits of the rule, and I am led to do so all the more because in the case of *Thomson* v. *Whitehead* he was thought to carry the doctrine of reconvention to its utmost length. He uses a very significant equivalent for *reconventio* (vol. i. 78) in calling it "*mutua petitio*"—a phrase which implies that each petition is before the Court for judgment. In his view reconvention is admitted on this ground—"Aequum enim visum fuit, ut judicem tanquam idoneum agnoscat unusquisque tanquam reus, quem tanquam actor etiamnum agnoscit . . . in tantum, ut et tanquam actor repellendus sit, qui causam reconventionis excipere tanquam reus recusat, neque reus ultra procedere teneatur in causa conventionis, si reconventus nolit ad mutuam respondere petitionem." No language could express more clearly that the *actio reconventionis* is admitted as an answer to an existing *actio conventionis*, and existing in the sense that it is before the Court for judgment. He makes his meaning even more clear in a subsequent passage when he says (vol. i. 80)—"Post litem conventionis, jam judiciali sententia terminatam reconventionem frustra fieri, inter omnes fere convenit neque enim ullo tempore mutuæ petitiones dici possunt, quarum una jam finem habuit, antequam alterius initium esset." I cannot imagine any words more directly applicable to the case before us. He is not dealing with technicalities. He is discussing a point of general law, and he gives it as the almost universal opinion of jurists that a final judgment in the *actio conventionis* excludes the *actio reconventionis*. The reason is obvious. After such a judgment the two actions cannot be "mutual" actions, or in other words they cannot be described as existing for judgment.

The point which we have to decide was not directly raised in *Thomson* v. *Whitehead*. The Court had only to determine whether a certain claim could be comprehended within the *actio reconventionis*. But they could not do so without entering more or less upon the considerations on which this question turns, and in holding that the jurisdiction was of a limited nature they went far to solve it. The late Lord President said that the rule will only apply "when the two claims—the *conventio* and the *reconventio*—may be tried simultaneously, and terminated by a single sentence or by two sentences contemporaneous or nearly contemporaneous. These words are to my mind very clear, nor do I see how they fail in definition. They limit the jurisdiction to the case where the two actions can be tried together, or in other words to the case where both are at the same time in dependence for judgment. The power of pronouncing sentences is mentioned as a corollary to the fact on which the jurisdiction depends; and though the judge must have the capacity of pronouncing contemporaneous sentences it is not necessary that they shall be absolutely contemporaneous. The period which may intervene between them can have no bearing on the question of jurisdiction.

I see nothing to the contrary in the opinions of the other judges, and much in confirmation. Most, if not all, seem to recognise that reconvention is an equitable remedy in aid or extension of a jurisdiction which is being exercised, and therefore that the two actions must be in dependence for judgment at the same time. Lords Cowan and Benholme cite with approval a passage from Vinnius which I think it worth while to quote at length—Vinn., lib. 4, tit. 6, ed. 1761, p. 859—"Illud obiter adjicio, posse eum, qui per se competens non est, ex accidenti competentem fieri idque vel propter judicium jam coeptum vel propter prorogationem jurisdictionis. Coepti judici hæc vis est, tum ut actorem mutuæ petitioni seu reconventioni, ut nunc in foro loquimur, obnoxium reddat, hoc est, ut mutuas rei actiones ibi excipere cogatur, ubi ipse litem movit, tametsi prius ibi conveniri non potuisset, tum ut litigatores retineat in judicio conjuncto." Lords Neaves, Mackenzie, and Jerviswoode shew that the action of reconvention is intended to enable the Court to deal effectually with all the questions which are raised in legitimate connection with the action of convention—as, for example, to reduce a deed on which the foreigner founds, or to consider pleas of compensation or of retention which are raised on the part of the original defender. Their view seems to be that the purpose of the action of reconvention is to complete an existing process, to the effect of enabling the Court to settle the claims on both sides.

If the two actions must relate to the same subject-matter it seems to be the natural consequence that the judgments in both must be contemporaneous, or nearly contemporaneous. There may not be the same necessity if the action of reconvention has a wider range. But in either case there must exist the capacity of pronouncing a contemporaneous judgment. It may be said that if the first judgment is pronounced in the action of convention, the jurisdiction in the other action must cease. It is not so. The existence of the first action is necessary to give jurisdiction in the other. But after the defender in the second action has pleaded on the merits, the contract of litiscontestation is

complete, from which he cannot withdraw.

It is urged that the circumstance that the decree is extracted satisfies the technicality, and that the jurisdiction may therefore be sustained. I do not understand the argument. It seems to me that the essential facts on which an equity depends must exist in truth, and that none of them can be represented or satisfied by a technicality. If it be a condition that the first action must exist for judgment at the time when the second is brought, that condition can not be satisfied after judgment has been pronounced. We cannot give an equitable remedy when the conditions of it do not exist in truth and substance.

I am aware that the decision of Lord Rutherfurd in *Baillie* v. *Hume* is against me, and I need hardly say that I have an unfeigned respect for any decision of that Judge. But no reasons were assigned for the judgment, and there was a strong inducement to entertain the action from the fact that it was laid on the wrongous use of diligence in the action on which the foreigner had sued. It raised a pure and somewhat technical question of Scotch law, and the defender may not have been very reluctant that it should be decided in a Scotch Court. Considerations of that kind, however, can do no more than indicate a reason why the defender should have acquiesced in the judgment, which remains an important authority against me. But availing myself of the light which has been thrown on the subject by the case of *Thomson*, I can come to no other conclusion than that which I have expressed.

There is another matter which deserves to be considered. Before the case was or could be heard on the plea of jurisdiction the final decree in the first action had been implemented. In accordance with our practice, all the pleas—whether preliminary or peremptory—were stated in the defences. But there could be no litiscontestation until the plea to the jurisdiction was decided. For there can be no litiscontestation before a judge who has no jurisdiction. The question is, whether the Sheriff was entitled to sustain his jurisdiction after the decree had been implemented, or in other words whether in determining the question of jurisdiction he was to have regard to the state of facts at the date when the summons was served, or at the time when his decision was asked. I am here assuming that in the former view the jurisdiction would be sustained.

If the jurisdiction depended on law there could be no doubt. When a defender is by law subject to the jurisdiction of the Court at the date of citation the jurisdiction will continue whatever changes may take place. We are not however dealing with a jurisdiction of that kind, but with a jurisdiction which depends upon equity alone. I do not think that anyone can appeal to an equity when the reason on which it depends has ceased to exist, on the simple ground that he cannot use the equity for the purpose for which it was given. It is given in order that the two cases may be considered together — though in my opinion not necessarily with a view to a simultaneous decree. But when the final decree pronounced in the *actio conventionis* has been implemented, I see no principle on which the pursuer of the *actio reconventionis* can ask the Court to proceed with it. He is then suing what has come to be an entirely independent action. It aids no defence; for the defences to the previous action have been surrendered. It has not been brought to enable the Court to dispose of the claims of both parties in mutual actions; for if it is to proceed it must proceed alone. There is nothing on which the decree of the Court can operate; for the sum decerned for in the previous action has been paid to the creditor. Nothing remains to justify the Court in sustaining its jurisdiction except the fact that the respondents had been the first suitors—a reason which is in itself insufficient. In short, it seems to me that at the time when the appellant asked the Court to sustain its jurisdiction, the equity which could alone have justified the demand had ceased to exist, and that his motion was properly refused.

For those reasons I am of opinion that the interlocutor of the Sheriff should be affirmed.

LORD TRAYNER—I agree with the majority of your Lordships in holding that the Sheriff-Substitute has erred, and that his judgment should be recalled.

We have, in the opinion of the Lord Justice-Clerk in *Thomson* v. *Whitehead*, a very full and clear exposition of the grounds on which jurisdiction *ex reconventione* is to be sustained, and all of the requirements necessary, according to that opinion (as I read it), to found such jurisdiction are to be found in the present case. The claim now made, as well as that which formed the subject of the *actio conventionis*, arise out of the same contract or transaction, and both cases were in dependence before the same Court at the same time—that is to say, this action was brought into Court while the *actio conventionis* was still a depending process. The only point in which the present case can be said to be wanting in the requirements necessary for jurisdiction *ex reconventione* is this—that looking to the state of the two processes, they could not have been terminated by a single sentence, or by two sentences, contemporaneous, or nearly contemporaneous. I leave out of view the fact that they could not be terminated by a single sentence, as that admittedly is not essential. It only remains to consider whether the two cases could have been terminated by sentences "contemporaneous or nearly contemporaneous." It is obvious that here we have no hard and fast rule; the words "contemporaneous or nearly contemporaneous" admit of a certain latitude as regards time as well as some differences of opinion as to what time will fulfil the description thus given. It is unfortunate that the rule should be ex-

pressed in language vague enough to admit of considerable diversity of opinion as to its meaning and application. Does "nearly contemporaneous" mean that the two sentences must be pronounced within days, or weeks, or months of each other? Or does the contemporaneousness of the judgment in the second action depend on what actually takes place, or upon what might have taken place? In the case before us it appears that the judgment in the *actio conventionis* was pronounced on 31st July 1893, and the judgment appealed against was pronounced on 8th February 1894, the interval being a little more than six months. If the Sheriff, instead of allowing a proof as he did on an incidental question about the dissolution of the defenders' firm, had at once allowed a proof of the whole averments of parties, he might have been in a position to decide the case on its merits (assuming jurisdiction) within the same time; and if so, it would not be extravagant to say that judgments so pronounced within six months of each other were "nearly contemporaneous." Indeed, but for the fact that the vacation in the Sheriff Court commenced the day after the Sheriff's judgment in the *actio conventionis*, the decision in the reconvention could have been pronounced a month or perhaps two months sooner. But I cannot think that the matter of jurisdiction is to depend on the accident of a vacation, or upon the manner in which the judge thinks right to deal with the case. I am not suggesting that in the present case there is the least room for finding fault with the Sheriff's mode of procedure. He was quite entitled to take the course he did. I am merely pointing out that a different course, if adopted, would have brought the two judgments considerably nearer each other in point of time. I can easily suppose circumstances under which the judgments in two actions like those we are now dealing with, arising out of the same transaction, depending before the same judge, might not be decided within a much greater interval than six months, and where such interval could not possibly raise a doubt as to the jurisdiction. But if that is so, then the question of jurisdiction cannot depend on the circumstance of the time, greater or less, which intervenes in point of fact between the judgment in the one case and the judgment in the other. I venture to think that what is meant by the cases being terminable by judgments nearly contemporaneous is this—that there shall be nothing in the cases themselves which precludes them from being so determined, but that no account is to be taken of anything in the forms of process, the sittings of the Court, the orders of the judge, or other accidental circumstance which may postpone the judgment in the one case longer than in the other. Viewed thus, I think the present case was one which might in ordinary course have been disposed of almost contemporaneously with the *actio conventionis*, and that in so far as the Sheriff has proceeded on the ground that the cases could not be so decided, he has erred.

But further, I think that the point of time when the question of jurisdiction or no jurisdiction is to be determined is the date when the *actio reconventionis* is brought. If there is jurisdiction, then the subsequent procedure in the case or cases will not destroy it. And, in my opinion, the only tests, at that date, of jurisdiction are (1) do the actions arise out of the same transaction, or are they *ejusdem generis?* (2) is the *actio conventionis* still in dependence? and (3) do the cases in themselves admit of being terminated by judgments nearly contemporaneous? If these questions are answered in the affirmative, there arises jurisdiction *ex reconventione;* if otherwise, not. Applying these tests here, I think jurisdiction *ex reconventione* was well founded.

I do not go into the other question disposed of by the Sheriff-Substitute as to the constitution of the defenders' firm. I agree in what has been said on that subject by your Lordship in the chair.

The Court pronounced this interlocutor:—

"The Lords having heard counsel, Sustain the appeal: Recal the interlocutor complained against: Remit to the Sheriff to proceed in the cause as accords."

Counsel for Appellant—Ure—Salvesen. Agents—Dove & Lockhart, S.S.C.

Counsel for Respondent — Guthrie. Agents—Auld & Macdonald, W.S.

Tuesday, June 5.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

GIBSON (ROSS ROBERTSON'S TRUSTEE) *v.* WILSON AND OTHERS.

Bankruptcy—Sequestration—Reduction—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *and Bankruptcy Act* 1869 (32 *and* 33 *Vict. cap.* 71).

In 1885 on a debtor's petition in the Bill Chamber, with consent of a concurring creditor, sequestration was granted, and a trustee appointed, who ingathered and divided the estate, and was afterwards discharged. In 1893 a trustee upon this bankrupt's estate, under an alleged arrangement with creditors in England in 1881, sued the trustee in the Scottish sequestration for reduction of the Scottish decree of sequestration, and all that had followed thereon, as incompetent and inept from the beginning, in view of the liquidation proceedings in England. Under the English proceedings three different trustees had been appointed before the pursuer, but no attempt had been made to ingather the bankrupt's estate. It was not averred that the defender had acted improperly. It was stated at the bar,