

years, I think in Chancery, borrowed to some extent from our form of records.

I ought to say, having made these observations, that I am prepared to agree in nearly all the observations which your Lordship has made in this case. But I do so with this qualification (if qualification it be), that in saying that whatever takes place before a judge may be reported, I do not mean (nor do I understand your Lordship to mean) to imply that all papers whatever which have been laid before the judge may be forthwith printed for the world at large. I do not think that follows in the least degree, and it would be very undesirable that it should be supposed that we are giving encouragement to any such idea. The principle which lies at the root of the right to publish is that when both parties have publicly stated their case an impartial report will be privileged, because there may be then justice and expediency in the public knowing accurately what is passing in courts of law, including the views urged on both sides. But documents printed *ex parte* before the case has proceeded beyond the initial stage may stand in a different position. In this particular case I agree with your Lordship that we need not go further into the matter than to explain that a summons is not by being called made public, and that not only is it not made public, but the clerk and agent are violating our rules and their duty if they take upon them to enable anyone to publish it at that stage at all. This is a most wholesome rule, for otherwise a pursuer who has nothing to lose, and cannot be criminally punished, might by raising a summons (which is a mere *ex parte* writ), and handing or causing it to be handed to the newspapers, ruin irretrievably the character of anyone he chose. The word "called" is a technical word. It has quite a different meaning in the Civil Court from what it has in the Justiciary Court (*vide* 3 Couper's Rep. 118). It does not mean publication in Court, although if the case goes on the date of dependence will, for reasons of expediency connected with diligence, prescription, &c., be held to draw back to the date of the calling, which forms the notice to the defender to attend to his defence as the case is now on the eve of coming into Court. On these grounds I agree with your Lordship that the Lord Ordinary's judgment should be adhered to.

LORD MURE—I concur, and I have no doubt of the relevancy of the action. In coming to this conclusion I do not consider that we are in any degree trenching upon the rule that what is publicly stated before the judge in open Court may be published in the newspapers. That, as I understand them, was the import of the English cases referred to; but this summons has never been so dealt with. It had only been placed in the hands of an officer of Court for the special purpose of having it called, and, as pointed out by your Lordship, that official was only entitled to deal with it in the limited manner prescribed by the Act of Sederunt, and that being so, neither this document nor the statements in it have ever been in a position in which they could be made known to the public in Court. When in such circumstances access is somehow or other obtained to a summons, and statements in it which contain matters injuriously and calumniously reflecting on the character of third parties are, as

here, published in the newspapers, an action of damages will, I think, lie against the publisher at the instance of a party aggrieved.

LORD SHAND—Proceedings in open Court before a judge may be made the subject of newspaper reports, provided always that the report be fairly and correctly stated. The public are entitled to be present to hear what occurs in open Court, and what is there published in their hearing may be again published if correctly repeated. But I agree with your Lordships that while the law so stands it will not aid the defender here. There had been no publication in Court or before a judge of this summons. I should think that as a condition of a right to publish what he did the defender must show that he was in such circumstances as gave him a right of access to and publication of the document. But, in the first place, in regard to the custodian of the summons—the clerk—it is provided by the Act of Sederunt that he shall not be entitled to give access to the summons or to exhibit it to anyone except the agents in the case. It is nothing for the defender to say that the calling of the summons was a judicial step of procedure unless he can further show either that he had a right of access to it as a public document or that it had been published in Court in the sense which I have explained. The only other way in which the summons can be obtained is through one or other of the parties. If they published statements of a calumnious or slanderous nature they would be liable in damages, and so must any third party who takes advantage of information obtained from them and in this way publishes statements calumnious in themselves. It was explained for the defender that he took his report from the morning papers, but that was no justification unless these papers were entitled to publish what they did. I agree with your Lordships in holding that the action is relevant and that the pursuer is entitled to an issue.

The Court adhered, and after striking out the word "wrongfully" approved of the issue as above set forth.

Counsel for Pursuer (Respondent)—J. C. Smith—Rhind. Agent—D. Turner, S.L.

Counsel for Defender (Reclaimer)—Trayner—J. A. Reid. Agents—Philip, Laing, & Co., S.S.C.

Tuesday, November 18.

SECOND DIVISION.

[Sheriff of Lanarkshire.

BARR (LAMONT'S TRUSTEE) v. SMITH & CHAMBERLAIN.

Jurisdiction—Reconvention—Where a Claim is Lodged in a Sequestration.

Held that the fact that an English firm had lodged a claim in a Scotch sequestration sub-

jected them to the jurisdiction of the Scotch Courts *rei conventionis* in an action against them at the instance of the trustee on the sequestrated estate.

Observed per Lord Gifford that a party suing a partner of a company upon a company debt lays himself open upon the principle of reconvention to be sued at the instance of the company.

In this case Mr J. M. Barr, accountant in Glasgow, sued Messrs Smith & Chamberlain, brassfounders, Birmingham, for delivery of certain goods. Mr Barr sued as "trustee on the sequestrated estate of James Lamont, gasfitter, &c., in Glasgow, trading sometime under the firm of Lamont & Renton, of which he was sole partner, and also as a partner of the firm of Lamont & Thomson, plumbers, &c., in Glasgow, and as an individual; and also as trustee on the sequestrated estates of Lamont & Thomson as a company, and John Thomson as a partner of the company and as an individual."

James Lamont's estates in these various characters had been sequestrated on 20th January 1877, and Lamont & Thomson's estate on 26th March 1877.

Sometime previously to these sequestrations, viz., in October 1876, Smith & Chamberlain had supplied a quantity of goods to Lamont & Thomson to the amount of about £180, for which sum they lodged a claim upon the sequestrated estate of James Lamont. In the beginning of February 1877, after James Lamont's bankruptcy, and within 60 days of Lamont & Thomson's, a large portion of the goods supplied were stated by the pursuer to have been taken possession of by Smith & Chamberlain without any price being paid for them, and without the knowledge of the pursuer, and it was to regain possession of these goods that this action was raised.

The defenders pleaded, *inter alia*, no jurisdiction.

During the progress of the case in the Sheriff Court, and upon the suggestion of the Sheriff-Substitute (GUTHRIE), the pursuer pleaded that the defenders were subject to the jurisdiction of the Scotch Courts *ex jure conventionis*, as having lodged a claim in James Lamont's sequestration. The Sheriff-Substitute thereafter sustained the jurisdiction on this ground and allowed a proof. The defenders appealed to the Sheriff (CLARK) who adhered. A proof was afterwards led on the merits, after which the Sheriff-Substitute ordained the defenders to deliver up the goods. On appeal the Sheriff (CLARK) adhered.

The defenders appealed, and argued on the question of jurisdiction—There was here no reconvention, for there could be none without convention, *i.e.*, calling into Court, and here no one had been called into Court, for all that had been done was to lodge a claim in the sequestration. Even admitting that in the ordinary case there was reconvention, it was not so here, for the parties were not the same. The claim had been lodged on James Lamont's estate, and it was Lamont & Thomson's trustee who was suing.

Authorities—*Black v. Knox & Ellis & Sons*, M. 1805, App. "Foreign," No. 7; *Thomson v. Whitehead*, Jan. 25, 1862, 24 D. 331.

Argued for the respondents—Reconvention was really an equitable rule of pleading. There was no separate jurisdiction conferred by it, but it was an answer to a plea of no jurisdiction. Here

there really was convention, and therefore reconvention, for the appropriate procedure under the Bankrupt Acts had been adopted.

Authorities—*Ord v. Barton*, Jan. 22, 1847, 9 D. 541; *Morrison and Milne v. Massa*, Dec. 8, 1866, 5 Macph. 130; *Elliot v. Aiken*, June 23, 1869, 7 Macph. 894.

At advising—

LORD JUSTICE-CLERK—There are two questions in this case, on the second of which we have not yet heard much argument. The first is the question of jurisdiction. In regard to this it is admitted that Smith & Chamberlain are an English firm, and that therefore there is no jurisdiction against them *prima facie*. It is said, however, that they are well sued in a Scotch Court on the principle of reconvention, and I am of opinion that this contention is right, and that this is one of the clearest cases of reconvention I ever saw.

I am not going into the vexed question of the origin of reconvention, and I should be sorry arbitrarily to lay down whether it is to be considered as an equitable balancing of claims in the same Court or as actually conferring jurisdiction. For my own part I am not prepared to say that reconvention is merely an equitable balancing of claims and nothing else. It is not necessary here to decide the principle, for in this case the equitable considerations which go to sustain the jurisdiction are very strong.

The goods which are the subject of this action are now in Smith & Chamberlain's hands, and they are part of the whole order originally sent. The question therefore is, whether the trustee, who, it is admitted, has been asked to pay a dividend to Smith & Chamberlain in respect of the price of the remaining part of the goods which have not been returned, is entitled to re-delivery of those which have been returned.

I cannot see the difficulty that was stated that the proper party is not here—that the convener was James Lamont and the reconveners Lamont & Thomson. The claim was no doubt made on the estate of James Lamont only, but it was as a partner of the firm of Lamont & Thomson, who purchased the goods, and it is of no moment whether Lamont was the primary or subsidiary debtor.

It was said that a sequestration was not a proper process, that there was no proper convention—no calling into Court—and that therefore there could be no reconvention. I do not see this at all. I think a sequestration has all the characteristics of a judicial process, and in point of fact the trustee is convened by a claim being lodged with him. I think that the plea of reconvention is here available, and that therefore there is here jurisdiction.

LORD ORMDALE—I agree. The pursuer is trustee on the estates of James Lamont as sole partner of Lamont & Renton, and also as a partner of Lamont & Thomson, and as an individual, and he is also trustee on the estates of Lamont & Thomson as a company and John Thomson as a partner of that firm and as an individual, and he brings his action in all these characters. James Lamont is the partner of the firm of Lamont & Thomson against whom Smith & Chamberlain choose to take proceedings for a

company debt, the other partner being in their opinion, and according to their own confession, worth nothing. In this situation of matters it is impossible to maintain that James Lamont is not here through his trustee. I think therefore that the trustee represents the necessary interest, and has a good title.

The other party maintain, however, that this being merely a sequestration there is no convention, and therefore there can be no reconvention. Now, this is a very peculiar plea, for it appears to me that in *Ord v. Barton*, 9 D. 541, and other cases, the Court did proceed on the footing that a sequestration and a claim in a sequestration is a good foundation for a plea of reconvention, and the trustee is therefore entitled to sue the creditors; and if ever there was a case where equity required it to be done it is the present. I am therefore clearly for sustaining the jurisdiction. It is another matter altogether as to the merits; we have not heard parties on them yet.

LORD GIFFORD—I am of the same opinion—(1) A claim in a sequestration is the appropriate judicial proceeding under the Bankrupt Act to bring the parties into Court. (2) On the second point, as to whether the necessary interests are here represented, I think they are.

In England a claim against a partnership is always made against the several partners of the firm, and in Scotland we have the same thing, except that we recognise in addition a separate estate in the partnership itself. I think that he who sues on a company debt one partner of a company lays himself open to be sued by the company on a plea of reconvention.

The Court therefore adhered on the question of jurisdiction, and they then proceeded to consider the case upon the merits, and in the result adhered upon that branch also.

Counsel for Pursuer (Respondent)—Asher—Lang. Agents—Macbrair & Keith, S.S.C.

Counsel for Defenders (Appellants)—Trayner—Mackintosh. Agents—Frasers, Stodart, & Mackenzie, W.S.

Tuesday, November 18.

SECOND DIVISION.

SPECIAL CASE — LAING AND SANSON AND OTHERS, AND EISDALE (LAING'S CURATOR BONIS) AND OTHERS.

Succession—Destination—Whether per stirpes or per capita.

A testator directed the residue of his estate to be divided "between my surviving brother and sisters and the lawful issue of those who may be deceased, share and share alike." At the date of the testament one of the testator's brothers had died leaving issue. *Held*, in a question between the testator's brother and sisters and the children of the deceased brother, that the division of the estate must be *per stirpes* and not *per capita*.

The deceased David Laing, LL.D., Librarian to the Society of Writers to the Signet, died on 18th October 1878 unmarried. By holograph trust-disposition and settlement, dated 12th March 1864, the deceased disposed to various parties as his trustees his whole means and estate, heritable and moveable, of whatever nature, presently belonging or which should belong to him at the time of his decease, in trust for various purposes, it being provided in regard to the residue as follows—"The surplus of my said effects and property to be divided between my surviving brother and sisters and the lawful issue of those who may be deceased, share and share alike."

The testator was one of nine children. He had five sisters and three brothers. At the date when the settlement was made two of his brothers were dead, one unmarried, the other leaving eight children; these eight children or their representatives were the second parties to this case. One of the testator's sisters died in 1871 leaving two children; they, along with two of the testator's sisters who survived him, were the parties of the first part. The other sisters predeceased the testator unmarried. The third parties were the testator's trustees.

When Mr Laing's estate fell to be distributed a question arose between the first and second parties as to the construction of the residue clause in the trust-disposition. The first parties maintained that the division there appointed fell to be made *per stirpes*. The second parties contended that the said division should be made *per capita*. The parties therefore presented this Special Case for the opinion of the Court.

The questions for opinion and judgment were—“(1) Does the residue of the deceased's estate fall to be divided *per stirpes*? (2) If the first question be answered in the negative, does said residue fall to be divided *per capita*?”

Authorities—*M'Courtie and Others v. Blackie*, Jan. 15, 1812, Hume 270; *M'Dougal v. M'Dougal and Others*, Feb. 6, 1866, 4 Macph. 372 (and Lord Cowan, p. 380); *Payne v. Webb*, Nov. 11, 1874, L.R., 19 Eq. 26.

At advising—

LORD JUSTICE-CLERK—I have no doubt in questions of this kind that the rule contended for by Mr Kinnear is quite sound, viz., that if you have an original bequest it will not signify that the parties favoured are called or nominated as members of a class. In that case, although others come in, it may be and it is a just rule that the division will be *per capita*. I regard the present case, however, not as an original bequest to the issue of a predeceasing brother as members of the class to be favoured along with the surviving brother and sisters, but on the contrary I think that the issue are treated as a class by themselves, and consequently in a question between them and such surviving brother and sisters the decision is very clearly *per stirpes* and not *per capita*. What the testator says is—"The surplus of my said effects and property to be divided between my surviving brother and sisters and the lawful issue of those who may be deceased, share and share alike." I read that, first, without any reference to the condition of the family at the time, and on the assumption that all the testator's brothers and sisters were alive, and the question is, in the event of any of them predeceasing or