Thursday, June 20.

FIRST DIVISION.

(Before Seven Judges.)

[Lord Skerrington, Ordinary.

HURST, NELSON, & COMPANY, LIMITED *v.* SPENSER WHATLEY, LIMITED.

Jurisdiction — Reconvention — Dependence of Actio conventionis.

An English company which had been sued by a Scots company in Scotland, using arrestments to found jurisdiction, brought a counter-action against the Scots company, which was conjoined with the original action, and judgment on the merits in the conjoined actions was given by the Inner House, which at the same time found the Scots company entitled to modified expenses. About five months after the final judgment in the conjoined actions, and before the account for expenses therein had been lodged for taxation, the Scots company brought another action arising out of the same subject-matter against the English company and pleaded jurisdiction *ex reconventione*. *Held* (*diss.* Lord Salvesen and Lord Guthrie) that the English company was not subject to the jurisdiction of the Scots courts *ex reconventione*.

Allan v. *Wormser, Harris, & Company*, June 8, 1894, 21 R. 866, 31 S.L.R. 698, *commented on*.

Arrestment—Jurisdiction—Arrestment ad fundandam jurisdictionem—Arrestment of Productions in Hands of Clerk of Court.

In order to found jurisdiction against an English company a Scots company arrested in, *inter alios*, the hands of the Clerk of Court certain planks which had been brought to Scotland to be used as productions in a litigation between the same parties, and the only value of which to the defenders was as evidence. *Held* (*per* Lord Skerrington, Ordinary) that the arrestment was inept to found jurisdiction.

Hurst, Nelson, & Company, Limited, in liquidation, and David Smith Macpherson, accountant, Greenock, the liquidator thereof, *pursuers*, brought an action against Spenser Whatley, Limited, Paddington, London, against whom arrestments were used to found jurisdiction, *defenders*, for payment of the sum of £2900 as a *quantum meruit* in respect of work done by the pursuers on defenders' waggons.

The pursuers pleaded—"(1) The defenders are subject to the jurisdiction of the Court of Session (*a*) *ex reconventione*; (*b*) in respect of the arrestments used to found jurisdiction."

The defenders pleaded—"(1) The defenders not being subject to the jurisdiction of the Court of Session on either of the grounds alleged by pursuers or otherwise, the action should be dismissed. (2) *Separatim*, this Court being in the circumstances set forth *forum non conveniens*, the action should be dismissed."

The *facts* of the case appear from the opinion of the Lord Ordinary (SKERRINGTON), who on 20th February 1911 sustained the first plea-in-law for the defenders and dismissed the action.

Opinion.—"The question in this case is whether the defenders Spenser Whatley, Limited, are subject to the jurisdiction of the Court of Session in the present action at the instance of Hurst, Nelson, & Company, Limited, in respect either (*a*) of reconvention, or (*b*) of arrestments to found jurisdiction. The pursuers are a company registered in Scotland, but having places of business in England. As they are being reconstructed, their liquidator is conjoined as a pursuer. One branch of their business is to repair railway waggons. The defenders are a company registered in England. In the course of their business as coal factors they own and use a large number of railway waggons. For many years prior to 1908 the parties did business with each other under contracts for the maintenance, reconstruction, and hiring of railway waggons. Under the nine maintenance contracts the pursuers undertook to maintain, paint, and repair for various periods certain groups of waggons belonging to the defenders, in return for quarterly payments calculated at so much per annum for each waggon. Under the reconstruction contracts the pursuers undertook to reconstruct individual waggons at various prices. Under the hiring contracts the pursuers hired waggons from the defenders for which they paid rent. On 24th March 1908 the present pursuers Hurst, Nelson, & Company brought an action against the present defenders, Spenser Whatley, concluding for payment of (first) £1933, 12s. 4d. and (second) £354, 2s. 2d. The sum first concluded for was claimed as due to the pursuers under the maintenance and reconstruction contracts after giving credit for what was due to the defenders under the hiring contracts. The sum sued for in the second conclusion was the damage claimed by the pursuers in respect of the defenders' alleged breach of the maintenance contracts. In reply to this action Spenser Whatley on 22nd June 1908 brought a cross-action against Hurst, Nelson, & Company. The summons contained six conclusions based on the three groups of contracts above referred to, and it concluded for moneys due under the contracts and also for damages for their breach. The total sum concluded for in the leading action was £2287 and in the cross-action £4871. The actions came before me as Lord Ordinary and they were conjoined. After a long proof I pronounced an interlocutor on 22nd February 1910, in which I disposed of the several conclusions, first in the leading and then in the cross-action. In the leading action I found that Hurst, Nelson, & Company were entitled practically to the sum sued for under their first conclu-

sion, but that they were entitled only to one shilling as damages under their second conclusion. In the cross-action my decision was, with certain comparatively unimportant exceptions, in favour of Hurst, Nelson, & Company. By interlocutor of 9th March 1910 the sums to which Spenser Whatley had been found by the former interlocutor entitled were fixed at £59 and £117, 1s. 6d., and I further found Hurst, Nelson, & Company entitled to expenses in the separate actions and also in the conjoined actions modified to three-fourths. Spenser Whatley reclaimed to the First Division, and on 8th March 1911 their Lordships pronounced an interlocutor disposing of the whole merits of the conjoined actions and also disposing of the question of expenses. It is apparent on the face of this interlocutor that a mistake in figures has been corrected at a later date, and I was told that this was done in the month of May with the consent of both parties. It was suggested by the pursuers' counsel that the final interlocutor of the Inner House must be held to have been pronounced not in March but in May 1911. I do not agree with this view, but the difference is not material.

The judgment of the Inner House affirmed my interlocutor except on two points, viz., (*a*) Hurst, Nelson, & Company's right to about £1100, which I awarded to them as the arrears which I held to be due to them under the maintenance contracts; and (*b*) as regards the expenses incurred in the Outer House. With reference to the first point, their Lordships held that the pursuers were not entitled to any sum under the maintenance contracts, and they accordingly to that extent recalled my interlocutor and dismissed the first conclusion of the summons at the instance of Hurst, Nelson & Company. The leading opinion was delivered by Lord Mackenzie, and I quote the following passage from it — 'The fact remains that the (maintenance) money had, in part, not been earned. How much had been earned cannot be determined in this process. The action is laid on the contract and, on the contract alone, as regards the £1123, 7s. 4d. of maintenance money. Though it may be somewhat of a hardship to Hurst, Nelson, the matter is not one of form but of substance. In my opinion they should, as regards the period between 1st October 1906 and 7th January 1908, have sued for *quantum meruit*, or have brought an action to recover damages for work done by them during that period and not paid for. It is not possible in this process to say what that sum should be. I am therefore unable to agree with the Lord Ordinary's view that Hurst, Nelson are entitled to decree for £1123, 7s. 4d.' The present action, which was signeted on 1st August 1911, was avowedly brought with the object of taking advantage of Lord Mackenzie's suggestion, and the pursuers plead that the sum sued for (restricted to £2314) is due to them either as a *quantum meruit* or in name of damages. As regards the expenses incurred in the Outer House, the First Division affirmed my judgment, finding Hurst, Nelson, & Company entitled to expenses in the separate actions and also in the conjoined actions, but they modified the amount to one-half instead of three-fourths.

"Another fact bearing upon the question of reconvention is not founded upon in the pleadings in the present action, but is vouched by the correspondence, the genuineness of which is admitted. On 28th July 1911—that is, three days before the signeting of the present summons—Spenser Whatley's solicitors wrote to Hurst, Nelson & Company's solicitors enclosing a cheque for £438, 16s. 1d., being the amount which they considered to be payable on a balancing of the amounts due under the conjoined actions. This cheque was accepted by Hurst, Nelson, & Company's solicitors, and although a trifling controversy remained unsettled, the fact upon which the defenders' counsel placed great reliance is substantially true, viz., that when the present action was raised Spenser Whatley were making no claim against Hurst, Nelson, & Company, and were ready and willing to pay the latter's account of expenses when taxed. Hurst, Nelson, & Company's account of expenses has not been lodged for taxation even at the present date (February 1912), but their counsel explained that the account was one of unusual magnitude, amounting to about £4000. It is not averred that the delay was intentional, and technically the action at the instance of Spenser Whatley is still a depending cause. In these circumstances, the question arises whether Spenser Whatley's action can be regarded as an *actio conventionis*, entitling Hurst, Nelson, & Company to bring the present action as one *reconventionis*.

"It was argued for the defenders that their cross-action against Hurst, Nelson, & Company was purely defensive, and that accordingly they could not be regarded as persons who had voluntarily appealed to the jurisdiction of the Scottish courts. There is authority to the effect that as regards reconvention the question is one of substance and not of form, and that an action which is truly defensive in its nature cannot be founded on as giving rise to this plea. A typical example is an action brought by a foreigner in the Scottish courts for the purpose of suspending threatened diligence on a bill of exchange. These authorities have no application to the facts of the present case. It is true that Spenser Whatley appeared as defenders in the leading action by compulsion in respect of arrestments used against them to found jurisdiction. It is also true that a cross-action was necessary in order to give effect to what they conceived to be their rights under the three groups of contracts. None the less, by bringing the cross-action they subjected to the jurisdiction of the Court of Session various questions which were not raised in the leading action, and by suing for a larger sum they practically placed their opponents on the defensive. I am accordingly of opinion that if the present action had been brought while the conjoined actions were depending for judg-

ment no valid objection could have been taken to the jurisdiction, and that it would not have been necessary for the present pursuers to arrest of new in order to found jurisdiction against the defenders. The whole difficulty to my mind arises from the fact that the present summons was not signeted until long after final judgment on the merits had been pronounced by the Court of Session in the conjoined actions.

"The pursuers' case rests upon the decision of the Second Division in the case of *Allan* v. *Wormer, Harris, & Company*, 1894, 21 R. 866. In that case the Lord Justice-Clerk (Macdonald), Lord Young, and Lord Trayner, decided that an action of reconvention was competently raised after final judgment on the merits with a finding of expenses had been pronounced in the action of convention. Lord Rutherfurd Clark dissented, and he quoted the opinion of Lord President Inglis in *Thompson* v. *Whitehead*, 1862, 24 D. 331, to the effect that reconvention will apply only '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.' The facts in *Thompson's* case raised an entirely different question from that which had to be decided in *Allan's* case or in the present case, but the dictum of the Lord President is of high authority, and it commends itself by its good sense. That dictum seems to me to deprive of all authority the earlier decision of Lord Rutherfurd in *Baillie* v. *Hume*, 1852, 15 D. 267, which in some respects is more favourable to the pursuer's than *Allan's* case. In *Allan's* case the Lord Justice-Clerk and Lord Trayner accepted as authoritative the Lord President's dictum, but they did not comment upon the requirement that the two claims 'may be tried simultaneously.' They discussed only the requirement that the two judgments must be 'contemporaneous or nearly contemporaneous.' While I prefer the opinion of Lord Rutherfurd Clark, it is my duty to give effect to the decision of the Second Division, and I can best do so by quoting the concluding words of Lord Trayner. After stating that the crucial date is that at which the *actio reconventionis* is brought, he proceeds—'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.' It is a question of fact whether in any particular case two actions can be terminated by judgments nearly contemporaneous. In considering this matter I have kept in view the observations of the Lord Justice-Clerk (p. 871), to the effect that delay from accidental causes ought not to be taken into account. Accordingly I discount the fact that the present action was brought in the beginning of the Autumn vacation of 1911, and that I was unable to hear the debate until early in February 1912. Allowing for all this, I am of opinion that it is impossible in the present case to hold that there is jurisdiction *ex reconventione* unless one is prepared to interpret Lord Trayner's third test in such a wide sense as to deprive it of all meaning.

"I now proceed to consider whether the pursuers have founded jurisdiction against the defenders by means of arrestment. The subjects arrested were some planks of wood, which Spenser Whatley cut out from certain of their wagons and lodged in process in the conjoined actions in order to prove that Hurst, Nelson, & Company had scamped their work. I do not pretend to forget a disreputable mass of rotten wood and putty which was exhibited in the former action. Fortunately for my judicial impartiality I did not see the whole of the wood, and I am prepared to believe that the sample was much worse than the bulk. The pursuers have arrested this wood in the hands of the Clerk of the First Division, and by way of precaution they have arrested also in the hands of the Superintendent of the Parliament House and of the defenders' Edinburgh solicitors. Through some clerk's mistake only one box of planks is noted in the inventory of process, whereas two boxes were understood to have been lodged and were treated as productions in the hands of the Clerk of Court, but I do not attach importance to this discrepancy. The defenders' counsel did not argue that the arrestments had not been used in the hands of the proper custodiers of the wood. Nor did he argue that an article, however valuable, which had been produced in process for the mere purpose of being used in evidence, could not be arrested in order to found jurisdiction against the unfortunate litigant or witness. No authority was cited to show that jurisdiction can be founded against a foreign litigant or witness merely because he lodged in process some article of value in order to assist the Scottish Court to arrive at a proper decision in a case depending before it. There is good sense in the view presented by the pursuers' counsel that a debtor may not place his property beyond the reach of his creditors by lodging it as a production in a litigation, but there is no sense in the logical deduction that an article can be arrested to found jurisdiction when the only purpose for which it was brought to Scotland was in order that it might be used to assist in the administration of justice in that country. I hope that it will never be decided that a foreign litigant who seeks justice, or a foreign witness who gives testimony in Scotland, can do so effectually only at the risk of being subjected to the jurisdiction of the Scottish courts in every kind of action at the instance of all and sundry. I do not need to decide this general question, because there is a separate ground on which I hold that

the arrestment was inoperative to found jurisdiction. The wood in question, when lodged in process, was valuable primarily as evidence—like the business books, plans, and documents in *Trowsdale's Trustee* v. *Forcett Railway Company*, 1870, 9 Macph. 88. It had also a trifling value as firewood, just as the books, &c., above referred to might have been worth something as waste paper. Firewood and waste paper are proper subjects of arrestment when the value is not elusory. But I demur to the view that by fiction of law the defenders should be treated as dealers in firewood. The case would have been different if after the end of the litigation they had placed the wood in the hands of a merchant for sale on their account. It is in this aspect that the correspondence may be of use to the defenders. It shows that the only value of the wood from their point of view was as evidence. If the arrestments in the present case are held effectual as a foundation of jurisdiction, the same would follow as regards pieces of machinery and models produced in patent cases. Many of these models are worth something as mechanical toys.

"For these reasons I am of opinion that jurisdiction has not been constituted against the defenders by arrestment. I do not agree with the view urged by the defenders' counsel to the effect that the pursuers were barred from founding upon the arrestment in respect that their solicitors had not assented to the suggestion of the defenders' solicitors that the wood should be destroyed or disposed of as of no further use. The pursuers' solicitors were right in refusing their consent, as it might have led to difficulties in the event of an appeal to the House of Lords if articles spoken to by the witnesses had been destroyed. The pursuers' solicitors did nothing to prevent the defenders' solicitors from borrowing the wood from process and returning it to the defenders in England, If this course had been followed, any attempt to arrest would probably have been unsuccessful. Further, I cannot construe the correspondence as evidence that the defenders abandoned their right of property in the wood. As regards the value of the wood, the pursuers offered to prove that it was worth nine shillings as it lay in the Parliament House, and their counsel quoted a decision to the effact that an arrestment of a sum of 9s. 3d. is sufficient to found jurisdiction. A proof in the Court of Session as to the value of the wood would be farcical. I decide the case upon the assumption that a dealer might be found who would offer nine shillings for the logs in order to use them as firewood, or to re-sell them to the Society of Antiquaries as a legal curiosity.

"I dismiss the action for want of jurisdiction, and sustain the defenders' first plea-in-law. As the defenders' second plea of *forum non conveniens* was carefully argued I may say that I would have repelled that plea if the action had been competently before me. The fact that the defenders plead *res judicata* shows how inconvenient and unjust it would be for the Court of Session to refuse to entertain the action. A Scottish lawyer can see at a glance that this plea is absurd, but an English Court might have difficulty in arriving at the same result."

The pursuers reclaimed, and on 14th May 1912 the case was ordered by the Extra Division to be heard before Seven Judges.

The case was heard before the LORD PRESIDENT, LORDS KINNEAR, DUNDAS, JOHNSTON, SALVESEN, MACKENZIE, and GUTHRIE.

Argued for the pursuers—The test of jurisdiction *ex reconventione* was not its effectiveness (which would exclude jurisdiction at an earlier as much as at a later stage), but the fact of the submission of the foreigner to the jurisdiction of the Scots Courts. Thus it was not necessary that the *actio conventionis* and the *actio reconventionis* should be capable of being brought to final judgment contemporaneously. This had been recognised in the case of *Allan* v. *Wormser, Harris, & Company*, June 8, 1894, 21 R. 866, 31 S.L.R. 698, where jurisdiction *ex reconventione* had been sustained after final judgment on the merits in the *actio conventionis*, and the question therefore was whether that case was rightly decided. The opinion of Lord Rutherfurd Clark, who dissented, proceeded partly on principle, partly on the absence of authority in Scots law, and partly on his construction of the civil law. The pursuers accepted the principle that there could be no reconvention when there was a finish of the lawsuit *judicii sententia*, the only question being when the finish was. There were certain Scots authorities not before the Court in *Allan* v. *Wormser, Harris, & Company, cit. sup.*, which supported the appellants' contention and the views of the majority in that case. These were *Balle & Brink* v. *Benton*, June 21, 1763, Mor. 4036; *Black & Knox* v. *Ellis*, June 7, 1805, Mor. Ap. "Foreign," No. 7; *M'Ewan's Trustees* v. *Robertson*, March 9, 1852, 15 D. 265; *Baillie* v. *Hume*, December 17, 1852, 15 D. 267; *Ord* v. *Barton*, January 22, 1847, 9 D. 541. These cases showed a practically continuous recognition of the principle in Scots law that the foundation of jurisdiction *ex reconventione* was not its effectiveness, or the possibility of compensation, but the submission of the foreigner to the jurisdiction. In *Longworth* v. *Yelverton*, November 5, 1868, 7 Macph. 70, 6 S.L.R. 22, where jurisdiction *ex reconventione* was refused, the ground on which the Court proceeded was that the original processes had been extracted. This case really supported pursuers' contention, and showed that the real test was whether the case was appealable or not. There might be an appeal from the Auditor's report raising the merits—*Stirling Maxwell's Trustees* v. *Kirkintilloch Police Commissioners*, October 16, 1883, 11 R. 1, Lord President at p. 2, 21 S.L.R. 1; *Inglis* v. *National Bank of Scotland, Limited*, 1911 S.C. 6, 48 S.L.R. 9. Reconvention depended on the vitality of the courts in the *actio conventionis*, and this subsisted till extract. In

the case of *Thomson* v. *Whitehead*, January 25, 1862, 24 D. 331, there was an exhaustive review of the law of reconvention by L.J.-C. Inglis, and he had expressed the view that to render the principle applicable the cases must be capable of being tried together and terminated by judgments nearly contemporaneous. But this view proceeded on a misconception of the civil law and the civilians. Thus Voet, book v, title i, sections 78, 80, 86, and 88, made it clear that compensation was not the test, and that though reconvention could not be pleaded after the termination of the *lis*, it could be pleaded up till then. So also Huber, Prælectiones, book. xi, title ii, section 5. The principle of reconvention was also recognised by the practice of the English courts—*Schibsby* v. *Westenholz*, 1870, L.R., 6 Q.B. 155, *per* Blackburn, J., at p. 161; *Yorkshire Tannery and Boot Manufactory, Limited* v. *Eglinton Chemical Company, Limited*, 1885, 54 L.J. Ch. 81; *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1897], 2 Ch. 487. Further, the present action arose *ex eodem negotio*, and it was not equitable that the foreigner should have his side of the question determined without pursuers' own claim being heard—*Morison and Milne* v. *Massa*, December 8, 1866, 5 Macph. 130. There was an analogy between reconvention and the plea of *lis alibi pendens*, and that plea could be sustained as long as the question of expenses was undisposed of — Mackay's Manual, 226; *Aitken* v. *Dick*, July 7, 1863, 1 Macph. 1038; *Kennedy* v. *Macdonald*, June 12, 1876, 3 R. 813, 13 S.L.R. 525.

Argued for the defenders—Reconvention was not applicable here in respect that (1) the *actio conventionis* had proceeded to final judgment; (2) this was not a true resort by the foreigner to the jurisdiction of the Scots courts in respect that he was originally brought there by an arrestment and really appeared as a defender; (3) if reconvention could be widened or narrowed according to circumstances, then equity required that this should not be made a case of reconvention. The pursuers being a company registered in Scotland could not be convened in an action in the English courts—*Watkins* v. *Scottish Imperial Insurance Company*, 1889, 23 Q.B.D. 285. And further, as pursuers only stated their claim by way of defence, it could not be maintained that they selected the tribunal—*Goodwin & Hogarth* v. *Purfield*, December 8, 1871, 10 Macph. 214, 9 S.L.R. 151. Roman law was not applicable, as it related to a different system—Bartolus, cited in *Thompson* v. *Whitehead*, *cit. sup.* The true test was that the two judgments should be capable of being given in one. *Thompson* v. *Whitehead*, *cit. sup.*, showed that the second action must be capable of being decided approximately simultaneously, but at what stage of the first action it was necessary to bring the second was a matter of circumstances. Reconvention was not an arbitrary rule of process, but a rule of equity—*Longworth* v. *Yelverton*, *cit. sup.* There was no institutional authority in Scotland, and no discussion of the question before *Thomson* v. *Whithead*, *cit. sup.* *Balle & Brink* v. *Benton*, *cit. sup.*, *and* *Black & Knox* v. *Ellis*, *cit. sup.*, were not examples of reconvention—*Vans* v. *Sandilands*, 1675, M. 4840; *White* v. *Spottiswoode*, June 30, 1846, 8 D. 952; *Ord* v. *Barton*, *cit. sup.*; *M'Ewan's Trustees* v. *Robertson*, *cit. sup.* In *Allan* v. *Wormser, Harris, & Company* the majority of the Court recognised the principle of contemporaneous judgments as the basis of reconvention, and that case therefore was not an authority against the principle, though a wrong application of it—*Davis* v. *Cadman*, January 13, 1897, 24 R. 297, 34 S.L.R. 260; *Oliver & Boyd* v. *Miller & Son*, January 18, 1905, 12 S.L.T. 634. The case of *Inglis* v. *National Bank of Scotland, Limited*, *cit. sup.*, was quite different from the present, because the Inner House in the present case having exhausted its judgment on the merits, could not raise them again on the Auditor's report—*Cruikshank* v. *Smart*, February 5, 1870, 42 S.J. 241. Further, the plea of *lis alibi pendens* was not *in pari casu* with reconvention, because in the former case the party against whom it was pleaded had it in his power to get rid of the first suit, and in any event there were cases where the plea had been refused, even though the first action was still technically in Court—*Gracie* v. *Kerr*, November 28, 1846, 19 S.J. 60; *M'Aulay* v. *Cowe*, December 13, 1873, 1 R. 307, 11 S.L.R. 156. The English authorities did not support pursuer's contention, Sup. Ct. Rules 1883, O. 31, Rules 15 and 16, and O. 19, Rule 27; "*The Salybia*," [1910], P. 25. [The LORD PRESIDENT referred to *Rousillon* v. *Rousillon*, 1880, 14 Ch. D. 351, *per* Fry, L.J., at p. 371.]

At advising—

LORD PRESIDENT—In this case Hurst, Nelson, & Co., who are a Scottish company, founded jurisdiction against Spenser Whatley, Ltd., who are an English company, by arrestments *ad fundandam jurisdictionem*, and brought an action against them in the Scottish Courts. Spenser Whatley, Ltd., appeared to defend, and at the same time brought a counter-action against Hurst, Nelson, & Co. The actions were conjoined; decree was given upon the merits in the Outer House; it was reclaimed to the Inner House, and the Inner House disposed of both actions—I need not go into particulars—by bringing out a sum in favour of Hurst, Nelson, & Co. with a finding of expenses in their favour. The case then proceeded in the ordinary way, that is to say, a remit was made to the Auditor to tax the accounts of expenses and to report, and nothing more remained to be done in those conjoined actions than the approval of the Auditor's report and the decerniture for expenses. Apart from that the cases are absolutely finished, and the decision upon the merits can never be altered unless by the House of Lords.

While the case was in this position Hurst, Nelson, & Co., who had not been found entitled to all that they conceived they were entitled to—the Court having

decided, so far as they were unsuccessful, upon the ground that they had sued for a sum upon contract instead of for a *quantum meruit*—raised another action against Spenser Whatley, Ltd., but this time without any arrestments *ad fundandam jurisdictionem*. Spenser Whatley appeared in that action and pleaded "No jurisdiction," and the sole question that has been remitted to Seven Judges is, whether there is in these circumstances jurisdiction *ex reconventione*, owing to the fact that Spenser Whatley, Ltd., may still be said to be in the Scottish Courts in respect of the dependence of the former action and cross-action to the limited extent that I have already explained, namely, for the stage which is represented by the approval of the Auditor's report on the expenses.

The Lord Ordinary held that there was no jurisdiction, but he did so upon what he considered was a specialty of the case. Apart from that specialty he considered that there would have been jurisdiction owing to the decision of the Second Division in the case of *Allan* v. *Wormser, Harris, & Co.* ([1894] 21 R. 866), in which case it was decided by the Lord Justice-Clerk, Lord Young, and Lord Trayner that an action of reconvention was competently raised, and that jurisdiction existed *ex reconventione*. Lord Rutherfurd Clark dissented from that judgment.

This case was reclaimed and came before those of your Lordships who were sitting in the Extra Division, and I understand that your Lordships then came to the conclusion that the Lord Ordinary's judgment could not be supported upon specialty, and that it was necessary therefore to decide the general question and to reconsider whether the judgment of the majority or the minority in the case of *Allen* v. *Wormser, Harris & Co.* was right, and for that reason the case was sent to Seven Judges.

Lord Rutherfurd Clark based his judgment in *Allan* v. *Wormser, Harris, & Co.* upon the opinion of Lord President Inglis when he was Lord Justice-Clerk in the case of *Thompson* v. *Whitehead* (1862. 24, D. 331).

I have considered carefully the various authorities that were cited to us in debate, and in particular the latter judgment, and I have come to the conclusion that in our books that is the only attempt which has been made to examine the principles upon which jurisdiction *ex reconventione* is founded, and I think that really nothing can be added to what Lord President Inglis said, that reconvention will apply only when two claims—the claim in the *actio conventionis* and that in the *actio reconventionis*—may be tried simultaneously and terminated by a single judgment or by two judgments contemporaneous or nearly contemporaneous. No doubt that makes it necessary to determine on the facts of each case what you mean by contemporaneous or nearly contemporaneous. It appears to me that the foundation of the whole thing, as Lord President Inglis puts it, lies in the ability of the Court to deal with two actions at one time and in one decree. And therefore I think that unless the case is in such a position that that can be done effectually, there is no reason for the exercise of jurisdiction *ex reconventione*. I do not think it is sufficient to say that inasmuch as the foreigner has come to the Scottish Courts he has by that step impliedly subjected himself, so to speak, for a time to whatever the Scottish Court may think fit to do with him. Of course this particular case is very peculiar. In the ordinary case it is the foreigner who comes here on his own account, and therefore to a certain extent he cannot be heard to complain of what happens to him in the way of jurisdiction when he comes. Here the foreigner did not come; he was brought. Then, no doubt, he raised the counter-action, but I do not think that peculiarity affects the application of the general principle of which I have spoken.

It appears to me that in the position in which this case was—that everything was done in the action and counter-action that could be done; that nothing that this Court could do could alter the decree on the merits; and that all that remained was merely to give effect to a finding of expenses against the foreigner and which the foreigner is perfectly willing to pay—there is no ground for upholding the jurisdiction *ex reconventione*. I do not mean that I think there might not be other circumstances in which the result would be different; for instance, supposing what is called the final judgment had only been pronounced by the Lord Ordinary and the reclaiming days had not expired, I have no doubt the action would have been in time, because it would still be possible in this Court to put the first action into such a position that a decree in the second action, if it could be obtained, could still be effectively set off against the decree in the first action; but here it is too late for that, and the mere possibility that such a result could be arrived at by a decree of the House of Lords does not seem to me to be sufficient to found jurisdiction *ex reconventione*. If, however, the case of *Allan* v. *Wormser, Harris, & Company* is held as deciding that so long as the original case is technically in Court—which it certainly is so long as there is still something to be done, even although it is only the approving of the Auditor's report—jurisdiction *ex reconventione* must be upheld as matter of right, I do not think it is well decided. I am not sure whether the Judges meant that at all, but if it be so, I disagree with the majority and I agree with Lord Rutherfurd Clark. Upon the whole matter here I think that the interlocutor of the Lord Ordinary is right, but that it must be put upon the general principle and not upon the specialty—a specialty which I myself do not give any attention to, because I understand that was disposed of in the Extra Division.

LORD KINNEAR—I agree with your Lordship, and upon grounds that may be very shortly stated. I think that by far the

most learned and closely reasoned exposition of this doctrine to be found in our books is contained in the judgments of Lord Justice-Clerk Inglis in the case of *Thompson* v. *Whitehead*, 24 D., at p. 339; and of Lord Rutherfurd Clark in *Allan* v. *Wormser, Harris, & Co.*, 21 R., at p. 874; and I think that the law must now be held as settled by these two judgments, notwithstanding that in the latter case Lord Rutherfurd Clark dissented from the majority of the Court. I hold it, therefore, to be settled that when a foreigner has appealed to the jurisdiction of this Court he must submit to that jurisdiction in any action which his adversary may raise against him for the purpose of enabling the Court to do full justice between the parties in the matter laid before it by the original action. It is an equitable extension of a jurisdiction that has been already invoked by the foreigner, and the principle of equity is that it is for the advantage of both parties, and is necessary for obtaining justice, that the whole matters in controversy between them should be settled once and for all by one judgment, or as the Lord Justice-Clerk puts it in the case of *Thompson* v. *Whitehead*, by two judgments which are contemporaneous or nearly contemporaneous. I cannot say I am at all disturbed by the criticisms which have been made by several learned Judges in the Second Division upon the Lord Justice-Clerk's way of stating the doctrine, because, with great respect, they seem to be accounted for by a failure to give sufficiently strict attention to what the Lord Justice-Clerk really said. He does not rest the definition upon the ground that two judgments must be contemporaneous or nearly contemporaneous alone; his judgment rests upon the ground that two cases must be tried at once, and final judgments pronounced once for all which will dispose of both, and then he goes on to state what Lord Rutherfurd Clark says is a mere corollary of that statement, that the judgments should be given contemporaneously or nearly contemporaneously. The difficulty which is said to be involved in the term "nearly" appears to me to be purely imaginary. It simply expresses what would have been implied if it had not been expressed, to wit, the reasonable latitude which must be given to the requirement that two judgments must be contemporaneous, which, nevertheless, may not be delivered in one breath. Nor am I impressed with the difficulties suggested as to the application of the rule in cases where it may be a question whether the judgment given by this Court, either by the Outer House or the Inner House, would or would not be a final judgment. I think that question belongs to a totally different and subsidiary chapter of the law of procedure; and I cannot see that there should be any difficulty in solving that as a practical question in any case which might arise. In the meantime no such question arises before us. In this action the original case is finally exhausted, so far as this Court is concerned, upon its merits, and nothing that can be done in a new action brought upon the ground of reconvention would enable the Court to consider their previous judgment or to touch it. It is said that it might have been reversed on an appeal to the House of Lords. But the notion that a final judgment of this Court is not to be considered final for the purpose of reconvention until after the lapse of a year from its date because the unsuccessful party has a year to appeal to the House of Lords is, to my mind, untenable; nor do I think that it was seriously pressed by the counsel who suggested it. The potentiality of an appeal cannot affect either the finality or the execution of a judgment of this Court; and if an action of reconvention should be brought after an appeal has been actually taken and intimated in terms of the statute, the procedure will be determined on the same considerations as any other question of interim regulation pending appeal. I therefore agree with your Lordship in the conclusion at which you have arrived, and I find it satisfactory to observe that the Lord Ordinary would have agreed also had he thought himself at liberty to give effect to his own opinion. The difficulty which is created by the decision in the case of *Allan* appeared to the Judges of the Extra Division to be considerable, and accordingly the case was sent to this Court to determine. But now that we have heard the case, while I am clearly of opinion that Lord Rutherfurd Clark's judgment was sound in law, and cannot agree with the learned Judges who dissented from it, I do not think it necessary to consider whether the actual decision might or might not be supported upon other grounds.

LORD DUNDAS—I am of the same opinion. I think the interlocutor reclaimed against, which dismisses the action, is correct, and that branch (*a*) of the pursuer's plea-in-law is as ill-founded as branch (*b*) is now conceded to be. I consider that the law of this matter was authoritatively settled by the "Whole Court" case of *Thompson* v. *Whitehead*, and am content to follow the rule expressed by Lord President (then Lord Justice-Clerk) Inglis. If that rule be applied as a working rule to the circumstances of the case before us, the result seems to me to be that the plea of jurisdiction *ex reconventione* must be repelled. It occurs to me to add two observations. The first is that the pursuers' counsel did not satisfy me that there is any true analogy between the plea we are here considering and that of *lis alibi pendens*; and he is not, in my judgment, in a position to take benefit from the existing decisions upon that question of procedure, some of which have gone very far as to the continued technical "dependence" of a process, and might, perhaps, not unfitly be reconsidered if a suitable occasion should arise. The other observation is, that if it had been necessary to consider and decide the defenders' plea of *forum non conveniens*, I should, as at present advised, have thought much more favourably of it than the Lord Ordinary seems to have done.

LORD JOHNSTON—I agree that the Lord Ordinary's judgment falls to be affirmed. The practice of the Scottish Courts in assuming jurisdiction *ex reconventione* is an equitable rule of practice or pleading, its motive being, as shown by the Lord Justice - Clerk (Inglis) in *Thompson* v. *Whitehead*, 4 D. 331, the equitable object of placing the native defender in the matter of counter - claims and counter-actions in the same relation to a foreign pursuer as he would have been had the pursuer also, like himself, been a native. It is not to be extended or applied beyond the attainment of that object. To sustain jurisdiction *ex reconventione* in the present case would be so to extend or apply it. If I may humbly do so, I should accept the dissenting judgment of Lord Rutherfurd Clark in *Allan* v. *Wormser, Harris, & Company*, 21 R. 867, as expressing the opinion which I have briefly indicated, and as conclusive of the question raised in the present case.

LORD SALVESEN—In common with your Lordships I accept the exposition of Lord Justice-Clerk Inglis in the case of *Thompson* v. *Whitehead* as stating the grounds upon which, according to the law and practice of Scotland, a foreigner may be subjected to the jurisdiction of our Court *ex reconventione*. The main difficulty, however, in the present case is to apply the rules which were laid down by that learned Judge, and which the majority of the Second Division, who decided the case of *Allan* v. *Wormser, Harris, & Company*, at least professed to follow. Several of these rules occasion no difficulty. Thus reconvention is admitted "not only where the two claims arise *in eodem negotio*, but also where they arise *ex diversis causis*, provided they be claims which can fairly be set against one another without violating some other rule of pleading or principle of equity." I apprehend that this would cover the case of a foreigner suing a Scotsman for the price of goods under a contract of sale, and the Scotsman retaliating with a claim of a similar kind under a different contract of sale. According to our rules of pleading, it would not be competent as between two natives to set off the one claim against the other in the original action, but a counter-action would require to be raised which could not be conjoined with the first, but which, nevertheless, might be conveniently tried by the same judge immediately after he had heard the evidence in the first. Some of the other Judges indicated an opinion that reconvention is not allowed except when the actions can be conjoined, but this was certainly not the view of Lord Justice-Clerk Inglis, and is not, in my opinion, in accordance with the balance of authority. It is plain, therefore, that the right to convene the foreigner who sues in a Scotch Court is not confined to cases where, by the law of Scotland, compensation can be pleaded, but rests upon the broad principle of equity as stated in the leading opinion, "that it is iniquitous and oppressive to demand payment of a debt, however just, while you withhold from your debtor his property or funds by the use of which he might be enabled to pay you."

The second rule is that the defender's privilege is limited to those cases where the subject-matter of the two claims can be conveniently tried at the same time and in the same court, and can be brought to a conclusion by one judgment (as in conjoined actions), or by two separate and contemporaneous or nearly contemporaneous judgments. This rule might be construed as meaning that an action *ex reconventione* was not competent after a judgment on the merits by the judge of first instance in an action raised by a foreigner against a Scotsman. I do not think, however, this is the true construction. If the judgment in the first case has become final, then it is impossible to comply with the rule that the two claims shall be brought to a conclusion by one judgment or by separate and nearly contemporaneous judgments, for the final judgment may be extracted at any moment and the other case would have to be litigated on its own merits; and the judgment would be separated in point of time from the earlier one by just such an interval as must necessarily elapse in order to have the pleadings adjusted and the case disposed of in the ordinary way. But where the judgment of the judge of first instance is still open to review at the time when the action of reconvention is instituted the conditions postulated in the rule may still be complied with. The earlier judgment may be appealed to the Sheriff or to the Inner House, and may, if the Court thinks proper, be sisted to await the decision in the second, so as to permit of both being tried in the Court of Appeal atsubstantially the same time and of contemporaneous or nearly contemporaneous judgments being pronounced. There may be many cases in which it would be equitable that such a course should be followed. The defender in the first action may have been so confident of success that he did not think it necessary to plead his counter-claim. If the judge of first instance, however, decided against him, and the judgment has not yet become final, I think he is entitled to bring his action of reconvention, and it does not appear to me to be material that he afterwards allows the judgment in the first action to become final. As Lord Trayner pointed out in *Allan's* case, the point of time in questions of jurisdiction which must always be looked at is the date at which the action is brought, and if jurisdiction then exists it is not affected by any subsequent change of circumstances.

Applying these principles, I think the case of *Allan* was well decided. At the time the action of reconvention was raised the judgment in the original action had not become final. It is true that judgment upon the merits had been pronounced, but the pursuer still required to appeal to the jurisdiction of the Scotch Courts in order to obtain a decree for his expenses. Had the defender therefore appealed the case it

was open for him to get the action sisted until judgment was given in the second action; and it would therefore have been possible for the Court of Appeal to have disposed of the two actions by contemporaneous or nearly contemporaneous judgments. The circumstance that the original defender felt that he could not with any reasonable prospect of success challenge the judgment that had been pronounced against him cannot, in my opinion, affect the question of jurisdiction. I differ from the view that reconvention is not a ground of jurisdiction. Unless it be so, the Court cannot entertain an action against the foreigner who is convened and who is not otherwise subject to the jurisdiction of the Scotch Courts.

I should like to add, with reference to something which has fallen from Lord Kinnear, that I think the distinction which he has drawn between a final judgment in this Court and a judgment on the merits in an inferior court shows that the decision of your Lordships is not inconsistent with the decision in the case of *Allan* v. *Wormser, Harris, & Company.*

Assuming, however, the jurisdiction to exist, it must always be a question of discretion whether in a particular case the Court think they should exercise the jurisdiction or should remit the pursuer in the action of reconvention to the *forum* of the defender. That was expressly laid down by Lord Young in his opinion in *Allan's* case, in which I respectfully concur, and has been given effect to in other cases, of which *Williamson's* is an example. In the present case the plea of *forum non conveniens* is presented with unusual force. In the first place the *actio conventionis* had been decided not merely by the Judge of first instance, but by a decision of the Inner House, which, although still appealable to the House of Lords when the *actio reconventionis* was raised, has since been permitted to become final. This latter action would therefore have to be carried through quite independently of the former process. A still stronger circumstance is that we were told by the respondents' counsel, without contradiction that the subject-matter of the dispute arose in England and that by far the greater number of the witnesses are resident there, and it may well be that if there be any difference between the laws of the two countries the proper law to apply is that of England. Further, there is no reason to suppose that the action will not be tried just as well in England as here; and I am not at all moved by the consideration which seems to have appealed to the Lord Ordinary, that a plea of *res judicata* might be entertained in the English Courts which would not have the smallest chance of success here. On these grounds I concur with your Lordships in holding that we should dismiss this action, not, however, on the ground that we have not jurisdiction to entertain it, but on the ground that it is not convenient that the jurisdiction which we possess should be exercised against the defenders here.

LORD MACKENZIE—The question in this case is whether the defenders, who are an English company, can be sued here *ex reconventione* by the pursuers, whose company is registered in Scotland.

The facts in connection with the previous action brought in the Court of Session by Hurst, Nelson, & Company, the pursuers here, against Spenser Whatley & Company, the defenders here, and the counter-action brought by the latter against the former, are given by the Lord Ordinary in his opinion. The merits of these litigations have been wholly exhausted and expenses have been awarded. The only thing that remains to be done is to obtain approval of the Auditor's report. These circumstances were also present in the case of *Allan* v. *Wormser, Harris, & Company*, 21 R. 866, in which it was held by a majority of the Court that an English firm was subject to the jurisdiction of the Court here on the ground of reconvention. The pursuers' counsel maintained that the judgment of the majority was conclusive in his favour, and the case has been sent to Seven Judges in order that it may be decided whether the view taken by the majority in the case of *Allan* was sound or not. An argument was maintained by the defenders which would obviate the necessity of considering the case of *Allan*, because they maintained that the previous action they raised against Hurst, Nelson, & Company was not of the nature of an *actio conventionis* at all, but had been brought in order to establish their counter-claims to the demands which Hurst, Nelson, & Company had made in the original action in which they were the defenders. As the Lord Ordinary points out, Spenser Whatley, Limited, did raise in the pleadings in their action various questions which were not raised in the leading action, and by suing for a larger sum they practically placed their opponents on the defensive. In this view I agree. Accordingly if Spenser Whatley & Company's action is to be considered as still in dependence, I think they would be liable to be sued in the present action. If that action is not in dependence, then there cannot be reconvention.

If the true test be whether there is anything that Hurst, Nelson, & Company have to set against any sum for which they might obtain decree, it is plain there is nothing here. When the present action was raised Spenser Whatley & Company were making no claim against Hurst, Nelson, & Company, and had offered to pay their account of expenses when taxed. It appears to me that the true test is whether the claim in the *actio reconventionis* can be pleaded in compensation to demands made in the leading action. I accordingly agree with the Lord Ordinary, who states that he prefers the opinion of Lord Rutherfurd Clark, who dissented in the case of *Allan*. Lord Rutherfurd Clark's opinion gives effect to the principles that were laid down by the Lord Justice-Clerk (Inglis) and the majority of the Court in the case of *Thompson* v. *Whitehead*, 24 D. 331, and its substance is that reconvention holds its

place in our jurisprudence on the equity that a foreigner who is appealing to the jurisdiction of a Scottish Court must submit to that jurisdiction in such actions as his adversary may raise and are necessary to enable the Court to do justice between the parties: that it is a condition of jurisdiction *ex reconventione* that the second action shall depend for judgment, for to hold that the *actio reconventionis* can proceed when the *actio conventionis* has ceased to be in dependence would be to act on a principle after the reason of it has ceased to exist. After final decree the cause cannot be in dependence for judgment. The question of expenses having here been disposed of, any further interlocutor approving of the Auditor's report will be merely executorial —*Inglis* v. *National Bank*, 1911 S.C. 6. The decree on the merits cannot be altered. The question, therefore, whether the decree has been extracted or not does not appear to be relevant, for the Judge after pronouncing decree has no power to alter its terms either before or after extract. The passages from the civil law cited by Lord Rutherfurd Clark show that the *actio reconventionis* is truly a *mutua petitio*, which implies that each petition is before the Court for judgment.

The case in which there is the fullest exposition of the law on the whole subject is *Thompson* v. *Whitehead*, and although it is not directly a judgment on the merits of the question here, as the ground of judgment was that the two claims did not arise *in eodem negotio*, yet the principles regulating reconvention were fully explained. The opinion of the Lord Justice-Clerk is summed up in the passage quoted in the opinion of the Lord Ordinary to the effect that reconvention will apply only "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." It is pointed out in *Thompson's* case that the law will have fully satisfied the principle of equity on which reconvention is founded if it allows the Scottish defender to protect himself against the demand of a foreigner by setting off against it *pro tanto* the foreigner's debt to him. The law of Scotland, like the law of Rome, permits reconvention out of favour to a defender that he may not be condemned to pay without his having at the same time an opportunity of enforcing his demand against the pursuer. The pursuer's counsel in the present case contended that there were further passages in writers on the civil law which threw additional light upon the matter. The result of the passages referred to appears to me to be this—that a foreigner during the dependence of the law suit, and while he is himself pursuing, is personally barred from objecting to the jurisdiction of the court in which he has brought his action in regard to all claims arising in *eodem negotio*, or even *ex diversis causis*, provided they are claims which could fairly be set against one another without violating some other rule of pleading or principle of equity. This view of the equity on which the plea rests was recognised in the case of *Longworth* v. *Yelverton*, 7 Macph. 70, and in *Davis* v. *Cadman*, 24 R. 297, Lord M'Laren pointed out that reconvention just means that when a pursuer, being a foreigner, takes proceedings here, and thereby submits the matters in dispute to the judgment of this Court, "he is not allowed to plead want of jurisdiction in any counter action which may be necessary for completely determining the rights of parties which are in dispute." This bears out the view that in a proper case of reconvention the question is one of the terms on which the pursuer is to get judgment in the leading action. In the present case, so far as this Court was concerned, what is being treated as the *actio conventionis* is at an end on the merits. It is not relevant to consider what the House of Lords might have done if an appeal had been taken. If this consideration was relevant, then the argument in *Allan's* case was futile. The merits of the cause which is treated as the *actio conventionis* have been exhausted in this Court.

It does not appear to me that the principles explained by the Lord Justice-Clerk in *Thompson's* case and Lord Rutherfurd Clark in the case of *Allan* are inconsistent with the decisions in any of the earlier cases, with the exception of *Baillie* v. *Hume*, 15 D. 267. That judgment is entitled to great respect, having been pronounced by Lord Rutherfurd, but no reasons are given in the report for the conclusion reached. The case of *Balle & Brink* v. *Benton & Others*, M. 4036, which at first sight appeared to be an authority for the pursuer here, proves on examination to contain a specialty which was quite sufficient for the decision of the case. Upon the application of Andrew Fowler, a merchant in Aberdeen, as agent for Benton, a merchant in Newcastle, a vessel was arrested at Aberdeen. Fowler was ordered to find caution for payment of all damages and expenses. As the result of the process at Benton's instance it was found by the Court of Session that the property in the ship had been regularly transferred by proceedings in Norway to a Danish purchaser. Benton and Fowler together with their cautioner were thereafter sued for damages and expenses in consequence of the arrestment of the ship and the judicial procedure following upon it. The facts above stated were quite sufficient to subject the defenders to the jurisdiction of the Scottish Court. *Black & Knox* v. *Ellis & Sons*, M. App. "For.," No. 7, is not an authority on the question of reconvention. It decided that a foreign creditor who executed a poinding in Scotland could only take the poinded goods subject to the *nexus* put upon them by Act of Parliament, and was bound under the Bankrupt Act to contribute the statutory proportion of the proceeds of the poinded goods. With all deference therefore to what is said about this case in *M'Ewan's Trustees*, 15 D. 267, *Black & Knox* cannot be regarded

as an authority on the question. In *M'Ewan's* case it was held that where a debtor who had been sequestrated and discharged under a composition arrangement had left Scotland he could not be sued in the Court of Session by a creditor for payment of the composition on the ground of reconvention.

In *Ord* v. *Barton*, 9 D. 541, the foreign defender was a claimant in a Scottish sequestration and it was therefore held, as Lord Moncreiff puts it, that he must take from us the whole law of bankruptcy which may bear upon his claim. The process in that case was a depending one. This case recognised that jurisdiction *ex reconventione* is not to be tested with reference to the power of the Court to give full effect to its decree.

It therefore appears to me that if the judgment in this case of *Allan* is to be taken as laying down law inconsistent with the opinion of the L.J.-C. Inglis in *Thompson*, it is not in accordance with principle or authority. I therefore arrive at the same conclusion as the Lord Ordinary. I do so, however, upon the grounds stated, not because I am able to distinguish the facts of the present case from those in the case of *Allan*.

It is not necessary to express an opinion upon the plea of *forum non conveniens* stated by the defender. The facts set forth in the third article of their statement of facts, however, show that there is much to be said in support of it.

LORD GUTHRIE—I concur in the opinion of Lord Salvesen. I think the action should be dismissed on the ground of *forum non conveniens* in accordance with the respondents' second plea, not on the ground stated in the first branch of the first plea, which the Lord Ordinary has sustained, namely, that the Court has no jurisdiction *ex reconventione*.

It is common gronnd that the two requisites necessary by the law of Scotland for an action of reconvention are, first, that the matters with which it deals must be the same as those in the action of convention, in the sense of being either *ex eodem negotio* or *ejusdem generis;* and, second, that the action of reconvention must be instituted while the action of convention is still, as Lord Rutherfurd Clark puts it in *Allan's* case, in dependence for judgment. It seems to me that what Lord Trayner states in the case of *Allan*, as a third element, namely, to quote the Lord Justice-Clerk Inglis in the case of *Whitehead*, that the action is only competent "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," is only an ingredient in the second requisite that the action of convention be still in dependence.

The Lord Ordinary holds, and it is not disputed, that this action satisfies the first requisite. The question is, Does it satisfy the second?

The expression "in dependence," used in the writings of the jurists and in the decided cases, is ambiguous. I read it as meaning in dependence for final judgment on the merits. If so, the date at which the question is to be considered is all-important. If the ruling date in this case is the present date, it is clear that the action of convention is no longer in dependence for final judgment on the merits, because the interlocutor of the First Division on the merits of that action is no longer appealable. If, however, the ruling date be the date of raising the action of reconvention, then, that action having been raised on 1st August 1911, it was still open to either of the parties to the action of convention to have taken the interlocutor of the First Division of 9th March 1911, disposing of the merits of that action, to review by the House of Lords.

I concur with Lord Trayner in the case of *Allan* that the date of raising the action of reconvention is the ruling date. If so, I do not see how, as at that date, while the period was running given by statute to the parties to consider whether they will treat a judgment as final or not, any final judgment on the merits can be properly said to have been pronounced, and the action in that sense to have been no longer in dependence.

Two consequences, inequitable to the native litigant, and not demanded in the just interests of the foreigner, seem to me to follow from the opposite view, as laid down by Lord Rutherfurd Clark in the case of *Allan*. First, I have difficulty in seeing how a sufficient distinction can be drawn—Lord Rutherfurd Clark makes none—between a judgment on the merits pronounced in the lowest of a succession of tribunals constituting a judicial system of lower and higher courts, and a judgment pronounced in one of the higher courts; and thus it would seem to follow that, after judgment on the merits has once been pronounced by a sheriff-substitute in the action of convention, an action of reconvention, competent so far as the subject-matter is concerned, cannot be brought for want of jurisdiction either in the Sheriff Court or the Court of Session.

The second consequence would seem to be that an action of reconvention would not be competent even if, before it was brought, the judgment on the merits in the action of convention had been appealed; and, *a fortiori*, it would not be competent if brought before an appeal was taken in the action of convention, even if, after it was brought, a timeous appeal was taken in that action.

I see nothing inconsistent with the Lord Justice-Clerk's opinion in the case of *Whitehead* in holding that by the law of Scotland a proper action of reconvention can always be raised while the relative action of convention is still in dependence for final judgment on the merits, meaning thereby, so long as the merits have not been disposed of by a judgment no longer appealable.

Nor, as at the date when this action was brought, do I see anything to prevent the

reasonable application of the Lord Justice-Clerk's rule laid down in *Whitehead's* case, that the two claims must be capable of being tried and terminated contemporaneously or nearly contemporaneously.

On the question of *forum non conveniens* I think this is a typical case for giving effect to that plea.

The Court adhered.

Counsel for the Pursuers (Reclaimers)—Moncrieff, K.C.—D. P. Fleming. Agents—P. Gardiner Gillespie & Gillespie, S.S.C.

Counsel for the Defenders (Respondents)—Sandeman, K.C.—J. R. Christie. Agents Davidson & Syme, W.S.

Friday, July 5.

SECOND DIVISION.

[Sheriff Court at Hamilton.

FREELAND *v.* SUMMERLEE IRON COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (3)—*Arbitration—Competency—"Question" Arising in Proceedings under Act.*

The employers of an injured workman admitted liability, and tendered payment of the compensation due on condition of the workman signing a receipt, which stated, *inter alia*—"At the first or any subsequent payment liability is admitted only for the compensation to date of payment. Further liability, if any, will be determined week by week, when application for payment is made." The workman having refused to sign the receipt and applied for arbitration, *held* that there was a "question" in the sense of the Act, and that arbitration was competent.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), enacts—Section 1 (3)—"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act . . . or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall . . . be settled by arbitration. . . ."

Charles Freeland, miner, Larkhall, *appellant*, being dissatisfied with a decision of the Sheriff-Substitute (SHENNAN) at Hamilton, acting as arbiter in an application by him for arbitration under the Workmen's Compensation Act 1906 against the Summerlee Iron Company, Limited, coalmasters, Larkhall, *respondents*, appealed by way of Stated Case.

The Case stated — "1. The accident occurred on 13th December 1911, and it arose out of and in the course of the appellant's employment with the respondents as a miner. The appellant has been totally incapacitated since said date. 2. The respondents are liable to pay the appellant compensation at the rate of 14s. 9d. per week in respect of total incapacity. 3. On 29th December 1911 the respondents admitted liability and tendered payment of the compensation then due. They requested the appellant to sign a receipt therefor, but the appellant objected to the terms of the receipt and refused to sign it. 4. The part of the receipt to which the appellant objected was contained in a note printed above the columns provided for a record of the dates and the amounts paid week by week. The part of the note objected to was the following—'At the first or any subsequent payment liability is admitted only for the compensation to date of payment. Further liability, if any, will be determined week by week, when application for payment is made.' Copy of the form of receipt is given in the appendix hereto.

"The appellant objected to the form of the receipt on the ground that he was entitled to have from the respondents a simple and unqualified admission of liability such as he could embody in a memorandum of agreement for the purpose of recording. He therefore invoked arbitration on the ground that a question had arisen as to the duration of the compensation.

"I was of opinion that no question had arisen between the parties which fell to be settled by arbitration, and accordingly on 14th February 1912 I dismissed the application."

The *questions of law* for the opinion of the Court were—"1. Do the foregoing facts disclose any question between the parties on which arbitration can competently be invoked? 2. Was the Sheriff-Substitute right in dismissing the appellant's application for arbitration?"

Argued for the appellant—There was here a "question" arising in proceedings under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58). The employer had only made a conditional tender of compensation, and by accepting it the workman was asked to discharge his statutory rights. Parties might be agreed as to the liability to pay and the amount of compensation, but they were at issue as to the duration—*John Brown & Company, Limited* v. *Hunter*, May 28, 1912, 49 S.L.R. 695. The contention of the respondents here was that they should hold an agreement terminable at pleasure, whereas the proper method of bringing compensation to an end was by an application for review—*Donaldson Brothers* v. *Cowan*, 1909 S.C. 1292, 46 S.L.R. 920. By the terms of the receipt the appellant would be obliged to submit himself to medical examination at any time instead of at the intervals provided by the statutory rules. The agreement must be an "echo" of the Act, otherwise it was not an agreement in the sense of the Act—*M'Ewan* v. *William Baird & Company, Limited*, 1910 S.C. 436, 47 S.L.R. 430.

Argued for the respondents—There was no finding that respondents had refused to pay compensation on other terms than the receipt. There was here no question as to the duration of the incapacity. There was therefore no dispute. It was not