same court with the pursuer, we need not absolutely determine. But certainly there is no case in our practice in which the plea of reconvention has been sustained on the sole ground that there once was a process in Court in which the pursuer and defender were parties. The judgment of Lord Rutherfurd in the case of *M'Ewan's Trustees* v. *Robertson* is a direct authority to the contrary; and the reasons of his Lordship's judgment commend themselves to my mind as satisfactory.

It must of course be understood that the Court, in giving judgment on the defender's first plea, have not considered, but on the contrary have abstained from considering, the merits of this reduction. Whether the Court and the House of Lords had jurisdiction to pronounce the judgments sought to be reduced or not, does not in the slightest degree affect the present question, which must be considered with regard to the position of the parties as they stand, or represent themselves to stand, at the time when this action was raised. But if the Court and the House of Lords were by the misrepresentation or concealment of parties led to pronounce judgments which they had not jurisdiction to pronounce, the party conceiving herself to be injured is not without remedy; for the courts of the country in which the parties are domiciled will not be bound by any judgment of this Court and the House of Lords, which these tribunals can be shown to have had no jurisdiction to pronounce.

I am for adhering to the Lord Ordinary's interlocutor.

Lord Deas differed, holding that as no other Court could competently reduce the judgment complained of, it was but justice, assuming the judgments to be null, to give the pursuer that redress here which she could not get elsewhere.

Lord Kinloch—I concur in the opinion that the Court has no jurisdiction to entertain the present action; and that the interlocutor of the Lord Ordinary should be adhered to.

In this question we are called on to consider the point of jurisdiction as a preliminary point, and abstractedly from the merits of the case. I think we are rightly so called. I do not think the legal question of jurisdiction is properly to be determined by consideration of the merits of the case.

It is clear that the principal of reconvention, in the ordinary and legitimate sense of the term, cannot be made applicable. Reconvention implies the existence in the Court of another action at the instance of the opposite party, the dependence of which renders the counter action admissible. There is nothing of the kind here.

The assumed ground of jurisdiction—which has been called, and very erroneously, by the name of reconvention—is, that the Court is competent to entertain the present action because it is an action to set aside a former judgment by the Court in a case between the same parties. But it still remains true that the present is a new and separate process, which the Court, as I conceive, cannot entertain, unless for this new process there is a legal ground of jurisdiction. The present is not, in any right sense, a process of review, or continuance of the former action, involving a continuance of the same ground of jurisdiction. To assume this would be at once fatal to the plea of the pursuer, who maintains that in the former action there was no jurisdiction. The judgment challenged is a decree *in foro*, not susceptible of review in the ordinary sense. No doubt it may in certain circumstances be set aside as null. But this involves the institution of a new action for which the intended defender cannot be cited, unless subject at the time of citation to the jurisdiction of the Court. This belongs not merely to technicality but to substantial justice, because after the previous proceedings are entirely at an end, and the party out of Court (it may be at the remotest corner of the earth), he cannot rightly be forced before a court to which he now owes no obedience. To warrant his citation to these courts there must be a presently existing ground of jurisdiction on which to support the citation.

The whole analogy of the law runs in this direction. There is perhaps no case in which previous proceedings would more reasonably infer continued jurisdiction than where a pursuer dies and it is proposed to transfer the action against a representative residing abroad. But it has been found in several cases that the action cannot be transferred unless there is a ground of jurisdiction apart altogether from the previous existence of the proceedings lying against the foreign representative. This arises just out of the principle that what the law considers a new action requires a ground of jurisdiction specially applicable to itself.

It by no means necessarily follows, that if the former judgment be truly null, it will have perpetual effect against the pursuer. In any question arising on the judgment within the defender's domicile, the Court of the domicile would be entitled to deny effect to the judgment if shown to be null for want of jurisdiction. If judicial proceedings were taken on the judgment in Scotland, the principle of reconvention might then conceivably apply to admit of a judicial challenge. All that is at present held is, that the mere circumstance of the previous proceedings between the parties, which proceedings are now entirely at an end, does not entitle the pursuer to force the defender into new litigation in a court which has no jurisdiction over him.

The Lord President intimated that Lord Ardmillan (presently sitting in the Registration Appeal Court) concurred with the majority.

Agent for Pursuer—Thomas Spalding, W.S.
Agents for Defender—Sang & Adam, S.S.C.

Thursday, October 29.

ANDERSON AND OTHERS *v.* COLVILE.

Proof—Road—Right of Way—Onus—*Reduction*—1661, c. 41. Pursuers of a right of way sought reduction of a warrant of the Justices under 1661, c. 41, and declarator of right of way. *Held*, in accordance with general rule, that the pursuers must lead in the proof, notwithstanding a defence that the road shut up under the warrant and now claimed by the pursuers was merely a private access to houses on the defender's property.

This was an action of right of way at the instance of certain residenters and feuars in the village of Torryburn, in Fifeshire, against Sir James William Colvile of Ochiltree and Crombie, and of Craigflower House, Torryburn.

It appeared that in May 1863 the defender presented a petition to the Justices of Peace in Quarter Sessions, under the Act 1661, c. 41, craving warrant to shut up a certain road or highway and cross

lane. This road, the pursuers alleged, was a public road, leading from one of the public streets of Torryburn, named Low Street or the Nether Causeway, near the house of Craigflower, to a public road running along the sea-shore from the west end of Torryburn, and from the public green to and past Crombie Point, and the pier and port and burying-ground of Crombie, as well as to the roads and villages lying along the shore to the south and east of Torryburn. The said road joined the shore road also by a fork, entering on the said shore road farther to the west. These forks, the pursuers alleged, were public roads, one of them being the cross lane already mentioned. The said two roads were part of one continuous and much frequented highway, and had been used by the public for more than forty years preceding the date of the petition. The pursuers further alleged, that in the year 1816 the predecessors of the defender had wrongfully shut up part of the old road, altering the line of road for their own convenience, but without much objection on the part of the public. The petition presented in 1863 stated that a new cart-road and footpath were to be substituted in lieu of those proposed to be shut up, the latter being, the petitioner alleged, on his own property. Various procedure then took place on the petition. Public intimation was made; objections were lodged; a committee of the Justices reported in favour of allowing the proposed alteration of road; and, finally, warrant was granted as craved. The pursuers now asked reduction of this warrant, and declarator that the roads in question were public roads, to the free and unobstructed use of which the pursuers and public were entitled; alleging, that the proceedings under the petition in 1863 were incompetent, the defender having no title to the *solum* of the roads which he attempted to shut up, and the public being in possession of the roads as public roads.

The defender contended, *inter alia*, that the roads shut up were not public roads, but were made as accesses to houses which formerly existed on ground now belonging to him; that, at all events, they were bye-roads, of no importance or use to the inhabitants of Torryburn or the public, who were better served by the new roads; and that the proceedings in 1863 were carried out consistently with the provisions in the Act 1661, c. 41.

The Lord Ordinary (BARCAPLE), in June last, pronounced an interlocutor, allowing the defender a proof that the roads shut up by him, and by his predecessor in 1816, were not public roads, but were made as accesses to houses on land now belonging to him, and to the pursuer a conjunct probation. The defender reclaimed, and asked the Court to recal that interlocutor, so far as it threw on the defender the *onus* of proof, and to find that the pursuers were bound to lead in the proof.

YOUNG and BALFOUR for reclaimer.

FRASER and KERR for respondents.

At advising—

LORD PRESIDENT—I confess I think this is not a case for departing from the ordinary rule, that the pursuer shall lead the proof, or be pursuer in the issue.

The pursuers here claim a right of way, and they are so far in an unfavourable position that they have against them a warrant of the Justices in Quarter Sessions, shutting up the road. The first thing they have to do is to get rid of that warrant. The Lord Ordinary has indeed said that he has decided that question in another action against the defender, and is prepared here to do the same; but we have not had that matter under our consideration, and all I shall say in the meantime is, that, looking to the procedure before the justices, I should not be easily persuaded that it ought to be set aside. But in the meantime, without proof, the pursuers cannot get the better of that warrant. They must prove the facts alleged on this record—still more, if they are to prevail in the other conclusions of the summons.

It is said, no doubt, that the defender has made a special defence, and has undertaken to prove that the road was made for a special purpose of his own, and was not in its origin a public road at all; that any use by the public was by sufferance. Now if the defender had been insisting on a proof of that fact as sufficient to void the whole case of the pursuers, I should have been prepared to listen to the argument. But the defender does not do that; on the contrary, he wishes the case to go on in the usual course. I cannot think that in such circumstances such an allegation by the defender ought to alter the ordinary course of procedure. Nothing is more common than that in such cases a defender should endeavour to make out such a defence. This interlocutor therefore must be varied to the effect of finding that a proof shall be allowed to the pursuers of their averments, and to the defender a conjunct proof in common form.

LORD DEAS—I am of the same opinion. Supposing this had been an ordinary claim to a public road, nothing more important could have been stated in defence than that this road was made by the defender for some special purpose. That, no doubt, is not conclusive. It is not the statement of a plea that excludes the action, for it is not inconsistent with that plea that the road has since become a public road. But it is more difficult for the public to make out a public road in such circumstances. The question would then be, whether the use by the public was stolen—the proprietor having no interest to prevent the public from enjoying the use of the road. We have had many cases of that kind: some cases in which that fact has been found so important as to entitle a defender to succeed when otherwise he would have failed. Take the case of *Jenkins* (4 Macph., 1046), where a right to a public road was claimed, and the defence stated by defender was, "I made this road for my own purposes, and I allowed the public to use it, but that was mere tolerance on my part." In that case the issue was in the usual form. The case was tried before a jury, and it afterwards came before us. We came to the conclusion that the defence was true, and that though the public had used the road for more than forty years, yet that was mere tolerance, and we granted a new trial. And I rather think that the grounds of our conclusion were felt to be so convincing that no new trial ever took place. The public might claim, and in some cases have claimed, a right of way through an avenue, but I don't know of any case where that was held to change the form of issue. Now the leading thing for the pursuers to do is to reduce this decree of the justices, obtained *causa cognita*, and after apparently very careful procedure, and I see no reason why they should not stand as pursuers. The procedure is all in ordinary form, and nothing is determined as to the *onus* of proof.

LORD KINLOCH—I am of the same opinion. I am not disposed to pronounce any judgment, or indicate any opinion as to the *onus* of proof. I only say that I see no reason for departing from the

general rule. If the defender had insisted on taking up a special point in his case, and going to issue on that, the case might have been different, but that is not so, all that is proposed by him is in the ordinary course.

Agents for Pursuers—D. Crawford and J. Y. Guthrie, S.S.C.

Agents for Defender—Mackenzie & Black, W.S.

Thursday, October 29.

COLQUHOUN *v.* BUCHANAN AND OTHERS.

Salmon-fishing—Salmon Fisheries Act 1867, 25 *and* 26 *Vict., c.* 97*—Roll of Upper Proprietors—Reduction—Held,* on a proof, that certain proprietors of lands on the banks of a river did not possess the qualification required by the Salmon Fisheries (Scotland) Act 1867 to entitle them to be on the roll of upper proprietors of salmon-fishings.

This was an action of reduction and declarator at the instance of Sir James Colquhoun of Luss, Baronet, against John Buchanan of Carbeth, Miss Barbara Govane of Park, Henry Ritchie Cooper of Ballindalloch, and Peter Blackburn of Killearn, and certain other parties. The question at issue was, whether these defenders were entitled to be on the roll of upper proprietors of salmon fishings in the district of Clyde and Leven, as possessing the qualification required by the Salmon Fisheries (Scotland) Act 1867, 25 and 26 Vict., c. 97, sec. 18?

By that section it is enacted that within three months after any bye-law constituting a district to be fixed and defined by the Commissioners appointed for that purpose shall have been published, "the Sheriff shall direct the Sheriff-clerk to make up a roll of the upper proprietors in each district, and the qualification of an upper proprietor shall be the property of a fishing entered in the valuation roll as of the yearly rent, or yearly value, of £20 and upwards, or, if such fishing be not valued on the valuation roll, of half a mile of frontage to the river, with a right of salmon fishing. . . . And the Sheriff shall have power to decide summarily any question arising on any claim to such qualification."

The Sheriff-clerk of Stirlingshire, in making up the roll under the statute, put thereon the names of the defenders, who, or their mandatories, attended meetings of the board, and acted as such members, under protest by the pursuer, who contended that the defenders were not entitled to act.

The pursuer, who is proprietor of salmon-fishings in both the upper and lower divisions of the Clyde and Leven district, now raised this action, asking reduction of the roll of upper proprietors, in so far as it included the names of the defenders, and also reduction of certain minutes of meeting of the board, and declarator that the defenders had no qualification entitling them to be upon the roll.

Defences were given in for Buchanan and Blackburn. The former, as proprietor of Little Carbeth and Dalnair, upon Crown charters, conveying the lands, with clauses *cum piscationibus,* these lands being situated on the Enrick, in the upper division of the said district, and having each, it was alleged, the requisite frontage; the latter, as proprietor of Drumtian and others, of similar situation and extent, with the mills, woods, and fishings of the same," alleged that by themselves and their authors they had been in use for a period of more than forty years to fish for salmon in the Enrick *ex adverso* of their lands by all competent and habile rights, and claimed right to be retained on the roll.

In November 1864 the Court, recalling an interlocutor of the Lord Ordinary, repelled certain of the defences as preliminary, and remitted to the Lord Ordinary to proceed with the cause. A proof was thereafter taken, after which the Lord Ordinary found that the defenders had failed to prove that they or either of them had fished for salmon *ex adverso* of their respective lands by net and coble, or by other competent and habile methods, as alleged by them; Found, therefore, that they held no title sufficient to qualify them to act as proprietors of a salmon-fishing, under the Salmon Fisheries Act, 1867, and accordingly decerned against them, with expenses.

The defenders reclaimed.

LORD ADVOCATE and HALL for reclaimers.

WATSON for respondents.

The Court adhered.

Agents for Pursuer—Tawse & Bonar, W.S.

Agent for Defenders—James Macknight, W.S.

Thursday, October 29.

GILLESPIE *v.* HONYMAN.

Husband and Wife—Action—Reduction ex capite lecti*—Heir-at-law. Held* that a husband was not entitled to compel his wife, proprietrix of an entailed estate, to sue a reduction *ex capite lecti* of a bond of annuity granted by her father, former proprietor of the estate, in favour of her mother.

This was an action raised by William Gillespie of Torbanehill, in the name of "Mrs Elizabeth Honyman or Gillespie of Torbanehill, heiress of entail of the deceased Sir R. B. Johnston Honyman, Baronet, and as such, in possession of the lands and estates of Torbanehill and others, spouse of William Gillespie of Torbanehill, with consent and concurrence of the said William Gillespie, and the said William Gillespie for himself and his own right and interest in the premises," and also as receiver of the rents *jure mariti,* against Dame Elizabeth Campbell or Honyman, mother of Mrs Gillespie, and relict of the late Sir R. B. Johnston Honyman. The object of the action was to reduce, *ex capite lecti,* a bond of annuity granted by the deceased Sir R. B. Johnston Honyman in favour of the defender.

The defender pleaded, *inter alia,* that the pursuer had no right to use the name of Mrs Gillespie in the action, she not having given any authority for such use; and contended that as Mrs Gillespie repudiated the action, it ought to be dismissed, in so far at least as it bore to proceed at Mrs Gillespie's instance.

The Lord Ordinary (JERVISWOODE) sustained this plea, adding the following note:

"The matter which the Lord Ordinary has dealt in the present interlocutor is one of some difficulty, but on the whole, after the best consideration which he has been able to bestow on the able argument which was on both sides submitted to him, and on the decisions in the cases of *Wedderburn's Trustees* v. *Colville,* Jan. 29, 1789, M. 10,426; *Aitkins* v. *Orr,* Feb. 11, 1812, M. 16.140; and *Ferguson* v. *Cowan,* June 3, 1819. which is reported but briefly by Baron Hume (Decisions, p. 222), he has come to the