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

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

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

The Court pronounced this interlocutor:—

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

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

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

Tuesday, June 5.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

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

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

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

but not averred upon record, that a sum of money belonging to the bankrupt was lodged on deposit-receipt in a Scottish bank which the pursuer wished to obtain, and which he feared the bank would refuse on the ground that the Scottish sequestration existed.

From circumstances stated in the case it was doubtful if the English bankruptcy proceedings actually existed in 1885, but the Court *held* that even assuming that proceedings were really pending in the English Court of Bankruptcy at the date of the Scottish sequestration, as no interest was stated which concerned the defender, he was not the proper contradictor, and must be assoilzied.

On 13th September 1884 David Hay Wilson, solicitor, Edinburgh, presented a petition in the Sheriff Court of Edinburgh, under the Debtors (Scotland) Act 1880 and the Bankruptcy and Cessio (Scotland) Act 1881, for cessio of the estates of Andrew Ross Robertson, residing in Edinburgh. Decree in the petition was pronounced by the Sheriff on 11th November, and extracted upon 17th December 1884. David Hay Wilson was elected trustee in the cessio.

Upon 14th May 1885 Andrew Ross Robertson, with consent of John Arthur Trevelyan Sturrock, S.S.C., as concurring creditor, presented a petition for sequestration in the Bill Chamber.

Upon 2nd June 1885 sequestration of his estates was awarded by the Lord Ordinary on the Bills (Trayner) in terms of the Bankruptcy (Scotland) Act 1856. David Hay Wilson was appointed trustee in the sequestration, and upon his death Charles John Munro, C.A., Edinburgh, was appointed to that office by act and warrant dated 2nd October 1885. Munro realised the estate, and after paying the legal expenses he divided the balance among the creditors, and was discharged.

Upon 14th July 1893 David Gibson, C.A., Liverpool, trustee in an alleged liquidation by arrangement or composition with creditors, taken out in the London Bankruptcy Court on 9th July 1881, of the affairs of the same Andrew Ross Robertson (designed as of 12 Calthorpe Street, Gray's Inn Road, in the county of Middlesex), brought an action of reduction of the decree of cessio, the decree of sequestration, and the acts and warrant appointing the trustees under these proceedings. He called Munro and the legal representatives of the late David Hay Wilson as defenders.

The pursuer averred that upon 9th July 1891 a petition for liquidation of Ross Robertson's affairs by arrangement or composition with his creditors, under and in terms of the Bankruptcy Act 1869 (32 and 33 Vict. cap. 71), and rules made in pursuance of that Act, was presented in the London Bankruptcy Court by the bankrupt himself, and notice of a meeting of creditors was duly summoned, and the notice published on 15th July 1881 in the *London Gazette*. At the meeting so called, held on 25th July 1881, Mr Alexander Hosie, commission agent, London, was appointed trustee. Upon 15th April 1889, by a resolution of creditors, Mr Hosie was removed from his post, and Mr Thomas Steven Lindsay, C.A., of London and Edinburgh, appointed in his place. On 17th April 1891 Mr Lindsay was removed from office by resolution of the creditors, and Mr Short, Incorporated Accountant, London, appointed trustee. Upon 31st October 1892 Mr Short was removed, and the pursuer Gibson was appointed trustee. "(Cond. 15) The decree of cessio and award of sequestration, and acts and warrants before mentioned were and are illegal, incompetent, and inept *ab initio*, for the reasons before stated, and also by reason of the said liquidation by arrangement of the affairs of the said Andrew Ross Robertson in the London Bankruptcy Court on 9th July 1881 under and in terms of the Bankruptcy Act 1869 (32 and 33 Vict. cap. 71), sec. 125, subsecs. 1 and 5, and rules made in pursuance of said Act. Said liquidation by arrangement still continues and is unclosed, and was continuing and pending on 11th November and 17th December 1884, and 2nd and 23rd June and 2nd October, all in the year 1885, the dates of the said pretended decree of cessio, extract thereof, and interlocutor or decree awarding sequestration of the estates of the said Andrew Ross Robertson, and the said pretended acts and warrants."

The defender Munro narrated his connection with the bankrupt's estate, from which it appeared that when he accepted office as trustee the assets consisted of certain stock of Scottish banks, which at the dates of the cessio and sequestration stood in name of the bankrupt's sisters. A multiplepoinding was raised regarding this stock, and the claimants were, *inter alia*, the present defender Munro, as trustee on the bankrupt's sequestrated estate, the bankrupt himself, his sisters, and the chief official receiver in bankruptcy in London, who in virtue of the provisions of the English Bankruptcy Acts represented and claimed as representing creditors under the English Bankruptcy of 9th July 1881.

After proof, the Lord Ordinary (Kinnear) ranked and preferred the defender Munro to the bank stock in question, being the fund *in medio*, and repelled the claims of the other claimants. As regarded the Official Receiver in Bankruptcy, his Lordship said—"The claim of the Official Receiver in Bankruptcy in London cannot be sustained in competition with his (the trustee in the sequestration), because the sequestration proceedings, in respect of which he claims, were closed and the debtor discharged in December 1882, and the sequestration was not awarded until May 1885."

The defender averred—"(Stat. 6) In virtue of the decision pronounced in the said action of multiplepoinding in favour of this defender he realised the bank stock, and after defraying the expenses he had incurred and paying those he was ordained to pay by the Court, he divided the balance amongst the creditors in accordance with his deliverances on their

claims thereon, which, as before stated, were adhered to on appeal by the bankrupt both by the Lord Ordinary and the Inner House. The defender has obtained his discharge as trustee in the said sequestration."

The pursuer pleaded — "(2) The said Andrew Ross Robertson having been made bankrupt in the London Bankruptcy Court in 1881, and which bankruptcy is still subsisting and pending, the said pretended decree of cessio, and interlocutor or decree of sequestration, and acts and warrants, were and are incompetent and illegal, and in violation of the Bankruptcy Statute (32 and 33 Vict. cap. 71), and general rules made in pursuance of said Act, and ought to be reduced."

The defender pleaded—"(1) The pursuer has no title to sue. (2) The action is incompetent. (4) No relevant nor sufficient grounds averred to sustain the conclusions of the summons. (8) *Mora.* (9) The whole proceedings complained of having been legally initiated and carried through, and this defender discharged as trustee, he ought to be assoilzied with expenses."

Miss Alice Wilson, called as representative of the first trustee on the sequestration, lodged defences but took no part in the discussion, and pursuer's counsel afterwards consented to her obtaining absolvitor with expenses against the pursuer.

Upon 27th February 1894 the Lord Ordinary (KINCAIRNEY) pronounced this interlocutor—"Repels the pleas-in-law for the pursuer; sustains the second, fourth, eighth, and ninth, pleas-in-law for the defender Charles John Munro: Assoilzies the whole defenders from the conclusions of the summons, and decerns.

"*Note.*—The pursuer designs himself trustee in the liquidation by arrangement or composition with creditors, taken out in the London Bankruptcy Court on 9th July 1881, of the affairs of Andrew Ross Robertson, and concludes for decree of reduction (1) of a decree of cessio of Robertson's estate, dated 11th November 1884; (2) of a decree of sequestration of that estate pronounced in the Bill Chamber on 2nd June 1885, and of two acts and warrants confirming, as trustees on the sequestrated estate, the now deceased David Hay Wilson, and after his death, the defender Charles John Munro. The most important conclusion is that for reduction of the decree of sequestration, and I shall consider that conclusion in the first place.

"One ground of reduction of the award of sequestration, stated in condescendence 14, was abandoned at the bar, viz., that the debt of the concurring creditor was insufficient in amount. Counsel for the pursuer admitted that he could not ask reduction on that ground.

"There is no other reason of reduction of the decree of sequestration stated on the record except what is stated in condescendence 15, which is this—that the award of sequestration was and is illegal, incompetent, and inept *ab initio*, by reason of the liquidation by arrangement of the affairs of Andrew Ross Robertson in the London Bankruptcy Court on 9th July 1881, which liquidation continues and is unclosed, and was continuing and pending on the date when the sequestration was granted.

"On examining the record I can find no distinct averment that a liquidation of Robertson's affairs was ever constituted by order of Court or resolution of creditors. No such order or resolution is produced, or indeed said to exist, although copies of certificates of appointment of the successive trustees are produced. It may be that, if I were to proceed perfectly strictly, I might throw out this action for want of any relevant averments of title. But this apparent defect in the record (which was not adverted to at the debate) may perhaps arise from mere inadvertence, or it may be that I may be under some misunderstanding on the point; and therefore for the purposes of the present judgment I assume that there existed a real process of liquidation of Robertson's estate by arrangement or compromise in the London Bankruptcy Court, and that that Court had jurisdiction to deal with that liquidation. I also assume that the liquidation had the same effect—so far as relates to the present question—as an adjudication in bankruptcy.

"Making these assumptions in the pursuer's favour, the case which he presents is that the award of sequestration pronounced in the Bill Chamber on 2nd June 1885 must be reduced because there was at its date a bankruptcy of Robertson's estate depending in the London Bankruptcy Court. That is the sole ground of reduction. It is not averred that the award of sequestration was obtained by any fraud practised on the Court, or on account of any misstatement made, or error under which the Court laboured. The pursuer does not state who the creditors are for whose behoof he appears, or that there are any creditors now claiming in the English bankruptcy. It is not said that the Scotch trustee holds or is accountable for any part of the bankrupt's estate, or that there exists elsewhere any part of the bankrupt's estate which the pursuer cannot recover by reason of the Scotch sequestration. There is no statement that the reduction has been brought with any practical purpose at all. Further, it is not said that the pursuer or those who preceded him in his office were not aware of the proceedings in the Scotch sequestration. Presumably they knew of them, because a Scotch sequestration is a public proceeding, and under section 48 of the Act of 1856 must be advertised in the *London Gazette*. In the absence of any averment of ignorance, I hold that the trustee under the English liquidation was aware of the proceedings in Scotland, and the pursuer now offers no explanation of his delay in making his challenge. The plea of the pursuer is therefore of the most general and unqualified character.

"I think the pursuer's contention cannot be supported, and that for various reasons.

"(1) There is no authority or precedent for a reduction of an award of sequestration. None of the counsel have found in the books any trace of such a decree, and that appears

to me a very cogent argument against the pursuer.

"(2) The Bankruptcy Statutes do not authorise reduction of an award of sequestration. They provide various remedies for mistakes in sequestration and methods of bringing a sequestration to a close.

"The sequestration of Robertson's estate was granted on the petition of the bankrupt presented under section 21 of the Act of 1856. It is now denied that the statutory formalities were complied with, and in that case under section 29 the Lord Ordinary was bound to award sequestration if he had jurisdiction. He had no discretion. The estates were sequestrated *vi statuti*.

"Perhaps the most important provision for the correction of errors in awarding a sequestration is that in section 31, which authorises recal of a sequestration within forty days after it has been granted, and directs the registration of the recal in the register of sequestration and on the margin of the register of inhibitions. Otherwise, according to the plan of the Bankruptcy Statutes, the bankruptcy must proceed after the forty days whatever the errors or misapprehensions may have been under which it was granted. There is no doubt that a petition for recal presented after the forty days would be thrown out as incompetent; and it seems strange to affirm that it is competent to bring an action of reduction when it is not competent to present a petition for recal.

The statute in sections 32, 35, 36, 38, and 40 makes careful provision for a sequestration being sisted or brought to a close after the lapse of forty days, when a certain majority of the creditors are agreed that it should be sisted or closed; and section 40 provides that a judgment declaring a sequestration at an end shall be registered in the same manner as a judgment of recal.

"By the second section of the Bankruptcy Amendment Act (23 and 24 Vict. cap. 33), provision is made for the special case in which it is shown that the bankrupt estate ought to be distributed under the bankruptcy laws of England or Ireland. In such cases the time allowed for presenting a petition for recal is extended to three months.

"Seeing that these remedies have been provided, and that the remedy of reduction has not been provided, I think that the remedy of reduction in the ordinary courts is not competent. It appears to me that the whole procedure in a sequestration is regulated by statute, that the scheme of the statute is that its provisions shall be carried out in disregard of mistakes or informalities not discovered within the time allowed. I am inclined to think that I have no power and no jurisdiction to pronounce any judgment in a sequestration which the Bankruptcy Statutes do not expressly authorise.

"It is true that it has been found that the Bankruptcy Statutes have failed to provide for every possible event, and that in such exceptional cases the Court has gone beyond the statutes and provided a remedy, But, in doing so, the Court has always acted in the exercise of its *nobile officium*, and never in the course of ordinary litigation. The case of *Anderson*, March 13, 1866, 4 Macph. 577 (where the Court in the exercise of its *nobile officium* declared a sequestration at an end nearly two years after it has been granted) furnishes a somewhat remarkable instance of the exercise of that exceptional judicial power. No such remedy could have been granted by the Court in the exercise of its ordinary jurisdiction.

"In this case there is no conclusion that the decree of reduction should be recorded in the register of sequestrations and inhibitions, and as the statute does not authorise any such entry, the result would be that the award of sequestration would appear in these registers, but not the decree of reduction if it were pronounced. If the statute had contemplated a reduction it would no doubt have provided for the registration of the decree.

"I hesitate to say, and it is unnecessary to do so, that these reasons would cover all cases which might be imagined. It is perhaps possible that a sequestration might be granted in such circumstances as to take it out of the Act altogether. For example, if an award were obtained through false personation, there might be room for an action of declarator that there had been no real sequestration. Possibly also some remedy might be devised in a case where it appeared that a sequestration had been obtained by fraud. It is not necessary to determine that.

"3. There is no adequate ground for reduction stated supposing reduction had been competent. It was argued that an award of sequestration is utterly incompetent, and a total nullity when another bankruptcy is pending elsewhere—a proposition which was sought to be supported by reference to *Young* v. *Buckle*, May 17, 1864, 2 Macph. 1077; *Goetze* v. *Aders*, November 27, 1874, 2 R. 150; *Phosphate Sewage Company* v. *Dawson*, July 20, 1878, 5 R. 1125; *Okel* v. *Foden*, June 11, 1884, 11 R. 907, and earlier cases there referred to. The language employed in some of these cases was certainly very general. But I doubt whether the pursuer's proposition can be affirmed in absolute and unqualified terms. It is true that the existence of a bankruptcy elsewhere would be, if not always, yet generally a sufficient reason for refusing a petition for sequestration or for recalling a sequestration. The defender argued that this resulted from rules of international comity, and not because the second sequestration would be incompetent. There are, however, opinions of very great authority which seem to go further than that, and I doubt whether our rule or practice can be referred to comity alone. But still it does not follow that an award of sequestration granted in such circumstances would be a nullity incapable of producing any consequence. It may also be true that a trustee in a bankruptcy has a universal title covering the whole estate, that there cannot be a partial bankruptcy, and that a second

sequestration would be ineffectual to carry any part of the estates. If that be so, it would appear that the Scotch sequestration can do the pursuer no harm. Still a sequestration has other consequences than the transference of the bankruptcy estate, and I think it has not been our practice to regard a second sequestration as wholly a nullity. It is of common occurrence that two petitions for sequestration of the same estate may be presented and granted, the earlier by a creditor, and the later by the bankrupt, and the more recent practice has apparently been to allow both awards of sequestration to subsist when that course appeared convenient—*Tennant* v. *Martin & Dunlop*, March 6, 1879, 6 R. 786; *Fletcher* v. *Anderson*, March 30, 1883, 10 R. 835. I do not think it has been decided that an award of sequestration or adjudication in bankruptcy deprives a judge before whom a second petition is presented of jurisdiction; and I think that when the bankrupt—being undoubtedly a Scotsman—presented his petition in the Bill Chamber, the Lord Ordinary had jurisdiction to entertain it, and having such jurisdiction, could (if not made aware of the English bankruptcy) do nothing but grant it. He may have acted under ignorance of the English bankruptcy, and therefore in error, but I see no ground on which that error can be corrected at this date.

"4. As I have said, I think I am entitled to assume that the English trustee knew of the proceedings in Scotland. Since the decree of sequestration many interests may have been affected by it, of which I have no information, and there may be various rights dependent on the sequestration. Various legal proceedings have taken place (all of them were probably, and some of them certainly, known to the English trustee) in which the validity of the sequestration was assumed or decided. I consider that in these circumstances this action is met by the pleas of personal bar and *mora*.

"5. The pursuer has stated no interest to reduce the decree of sequestration. If he has none, it would, in my opinion, be out of the question to grant a decree of reduction of the consequences of which one cannot be assured. In the argument for the pursuer it was said that he contemplated proceedings against the Scotch trustees. Had these been indicated on the record the relevancy of the pursuer's claims would have been discussed, and if they were found irrelevant the result would have been absolvitor from the whole conclusions. It seems to me that this case must be taken on the footing that he has no such claims.

"I therefore am of opinion that I am in a position to repel the whole pleas of the pursuer, and to sustain the second, fourth, eighth, and ninth pleas for the defender C. J. Munro, so far as these refer to the decree of sequestration.

"The decree of cessio seems to be challenged on the further ground that the proceedings were fraudulent, although that is only stated generally, and that the petitioner on whose petition decree of cessio was granted was not a creditor of the bankrupt. But as the cessio was superseded by the sequestration, I think the conclusion for reduction of it may be disposed of on the ground that the pursuer has set forth no interest entitling him to sue a reduction of that decree.

"The acts and warrants are challenged because they were, it is said, signed by the Sheriff-Clerk-Depute and not by the Sheriff Clerk, as is required by section 73 of the Act of 1856 and Schedule D. The pursuer quoted no authority, although, I think, such acts and warrants must very frequently have been signed by Sheriff-Clerks-Depute. I see no title which the pursuer has to raise the question. I am further of opinion that it is in itself unfounded, and, besides, that it comes too late after the title has been acknowledged no doubt many times in the Court in which it was issued.

"The defender Munro has stated the plea of *res judicata*, and has set forth various judicial proceedings on which that plea is founded. He has also pleaded that Robertson is *dominus litis*. I have not been able to see that the plea of *res judicata* can be sustained without inquiry. If the plea that Robertson is *dominus litis* were established, then there would be ample ground for the plea of *res judicata*. The judgment of Lord Kinnear, mentioned in statement 3, would also be *res judicata* if it were made out that the Chief Official Receiver who appeared then represented the interest now represented by the pursuer. But neither of these points can be assumed, and therefore as the case stands I cannot affirm the plea of *res judicata*."

The pursuer reclaimed, and argued—Two processes of sequestration could not exist together for the distribution of the same estate, and the Scottish sequestration was incompetent and null from the beginning, because there was an English sequestration existing at the time it was granted. Where the courts of any civilised country had provided a means for ingathering and distributing the property of a bankrupt, the courts of this country would recognise that process, but here it was not necessary to refer to the rules of international law, because the English sequestration was carried on under an Imperial statute which this Court was bound to recognise. It was settled by authority that where sequestration proceedings existed in another country the Court would not allow sequestration to proceed here—*Young* v. *Buckel*, May 17, 1864, 2 Macph. 1077; *Goetze* v. *Aders*, November 27, 1874, 2 R. 150. Here there was a sum of £2000 in bank which the English trustee might get, but the bank would refuse to pay on the ground that the Scottish sequestration stood in the way.

The respondent argued—There was no English sequestration pending in 1885, because the bankrupt had been discharged by a special resolution of his creditors upon 25th July 1881, and the claim of the Official Receiver had been dismissed by Lord

Kinnear on 20th November 1886, on the ground that the English proceedings came to an end in 1882. Assuming, however, that the English sequestration was really in force in 1885 the action ought to be dismissed. The trustee was appointed by the Court, and had done his duty in the ordinary way, and been discharged by the Court without any objection, and nothing was alleged against his conduct in the course of the sequestration which would amount to vitious intromission. The cases cited by the pursuer amounted to no more than this, that if it was brought to the notice of the Court that a process of sequestration of the bankrupt's effects subsisted in a foreign country on a petition presented within the proper time, the Court might recal the sequestration, but that was not reducing the preceedings in a completed sequestration. That question came to be in fact a matter for the consideration and direction of the Court which granted the sequestration. That was the rule in England—*ex parte Robinson*, February 22, 1883, L.R. 22 Ch. Div. 816. The Scottish law did not differ. If the fact of the English sequestration had been brought under the notice of the Lord Ordinary on the Bills when sequestration was applied for, he would have considered the question and might have refused to grant it, but it was not made known to him.

At advising—

LORD YOUNG—This case, as the Lord Ordinary says, is unprecedented in this respect, that it is the first instance that has occurred in which a pursuer seeks to reduce an award of sequestration and all the proceedings which followed upon that award, and I hope it will be the last.

The statute under which all awards of sequestration are granted in this country is the Bankruptcy Act of 1856. It is there enacted that "sequestration may be awarded of the estate of any person in the following cases—First, in the case of a living debtor subject to the jurisdiction of the Supreme Courts of Scotland—(*a*) On his own petition with the concurrence of a creditor or creditors qualified as hereinafter mentioned." There is another case which I need not refer to.

Now, in the case before us sequestration was granted of the estate of Robertson, who was subject to the jurisdiction of the Supreme Courts of Scotland, on his own petition, and with the concurrence of certain creditors named. Therefore, *prima facie*, there is no doubt of the competency of the application and the jurisdiction of the Court to grant it, and it was accordingly granted in 1885. It is no part of the pursuer's case in this action that in the granting of the sequestration anything was done which was not in all respects regular and according to the requirements of the statute. The proper advertisements were made, a trustee was appointed, the estate was ingathered and distributed among the debtor's creditors, and in 1893 a reduction is brought of these proceedings without any previous notice, and that on the ground that the estate of the bankrupt had been put into liquidation in England in 1881, so that nine years after the grant of the Scottish sequestration it is for the first time challenged, on the ground of an *ex parte* proceeding in England thirteen years before, and the ground of the challenge is that by the Scottish common law it was incompetent for the Courts in Scotland to apply the provisions of the statute in the case of a debtor domiciled in Scotland when proceedings in liquidation were pending against him in any other country.

It is a question whether these proceedings were in dependence at the time of the sequestration, for on the documents before us it appears that the bankrupt himself was discharged in 1881, and it appears from the judgment of the Lord Ordinary on the Bills, in an action connected with these very sequestration proceedings, that the claim of the Official Receiver in Bankruptcy on the debtor's estate could not be sustained because the sequestration proceedings in England under which he alone claimed were brought to an end in December 1882.

The Lord Ordinary expresses some doubts whether a real process of liquidation in England existed over this debtor's estate, but he assumes, and I will also assume, that real proceedings were pending in England, and on that assumption are we to entertain an action for reduction of an award of sequestration on a mere statement of the existence of these liquidation proceedings at the time it was granted without any averment that assets had been recovered under that liquidation or that anything had ever been done under it, except the appointment of these receivers in succession? No averment is made that they were ignorant of the Scottish proceedings, and no explanation is made of the delay in bringing forward this action now, after the proceeds of the bankrupt's estate have been ingathered and distributed and the trustee discharged. For my own opinion, I concur with the Lord Ordinary that such an action of reduction ought not to be entertained.

I sympathise with the view, and hold the law quite settled, that in the course of proceedings under the Act of 1856 the Court will not award sequestration as a matter of course if in answer to the advertisements in the *Gazette*, or from any other source, it is brought under the notice of the Court that prior to the Scottish application liquidation proceedings had been taken in England under which the estate of the bankrupt could be properly ingathered and distributed. That would be allowing two actions for the same purpose. Again, if sequestration had been granted, and notice of the previous application was given to the Court within the period allowed by the statute for stating objections, I do not doubt they could recal it. But that is a very different thing from reducing the whole proceedings as null and incompetent from the beginning on the ground of want of jurisdiction in originally granting the

sequestration, although the case may be represented as an instance of circumstances in which the Court ought not to have granted sequestration if an application to that effect had been made timeously.

In short, the pursuer of such an action as this stands necessarily upon a rule of the common law. Now, the rules of international law and the considerations of comity and courtesy upon which they are based are parts of the common law of the civilised world, and I have no doubt that our rules upon this matter are the same as those which were expressed by a learned Judge in England in one of the cases cited to us—*ex parte, Robinson*, February 22, 1883.

I think it is the same with us. I have no doubt at all that this Court has jurisdiction to award sequestration for all the purposes it may effect, notwithstanding the fact that a liquidation process has been begun in another country for the same purpose, if this Court saw fit to use its discretion in granting the sequestration. But that is a very different thing from creditors waiting a long time after the granting of sequestration and the division of the estate, then coming forward and saying the whole of the proceedings are null from the beginning and must be reduced, without putting forward any explanation of the delay or suggesting any reasons for ignorance of the Scottish proceedings. I am of opinion that we have jurisdiction, and that Lord Trayner had jurisdiction when as Lord Ordinary on the Bills he granted this sequestration, and if the circumstances which have now been mentioned to us had been brought under his notice he would have considered them, and have given judgment accordingly, and his judgment, it may be, would have been brought under the review of the Inner House on the merits. In all this the Court would have been exercising its jurisdiction, although it may be that had the circumstances which have now been mentioned been brought under the notice of the Court it would have exercised its jurisdiction differently, and might have refused to award sequestration.

In this case, however, apart from that view, and without going the whole length of the opinion I have just expressed, this action is brought against a trustee in bankruptcy, an officer of the Court, and it is brought when he has done all that he was empowered to do, and when he is discharged from his office by the Court, on the ground that the Court had no jurisdiction to appoint him originally. I think such an action is altogether out of the question. I do not say I cannot figure an action which might be brought against an officer of the Court. A pursuer may come forward, and asking for reduction of the whole proceedings on the ground of something which the officer himself has done, and which has the effect of rendering all the proceedings null, and the officer himself a vitious intromitter with the estate of the bankrupt. There is no suggestion in this case that the trustee acted otherwise than regularly, and within the scope of his duties, and he has been discharged. There is no suggestion that he is liable to give in any other account than that which he was liable to give in on the ground of his holding the appointment he did, and from that account he has been discharged.

It may be competent for the pursuer here, or for anyone who is pursuing a remedy, to which the defence set up is a discharged sequestration, to which sequestration he thinks he has an answer, to bring a reduction of the award, but then that reduction must be brought upon a relevant case. It was said at the bar that there was a sum of money in a bank which the trustee in the English sequestration wished to get hold of, and that the bank, when asked to hand over this money, put forward the Scottish sequestration as a bar to that, but it had not even been ascertained that the bank has in fact said so. The proper course would have been to make a judicial claim on the bank for repayment of the money, and if the bank pleaded the sequestration as a bar to payment, then it might be stated as an answer to this defence that the sequestration ought not to have the effect contended for because of the existence of a prior sequestration in England. The bank is not here, and indeed I am surprised that the discharged trustee in the sequestration took any notice of the matter at all. Instead of that he might have wrapped himself in his cloak of office and said, "I was appointed by the Court, I have been discharged by the Court, and it is not said that I did wrong in the conduct of the business given me. I am not the guardian of the jurisdiction of the Court of Session; I assumed that the Court had jurisdiction when they appointed me." I am, generally, for repelling the whole reasons for reduction stated in this action so far as directed against this trustee.

LORD RUTHERFURD CLARK — This is an action of reduction of an award of sequestration and all that followed on it. The defender is the last trustee appointed under the sequestration, and before this action was raised he was discharged. On a question being put by the Court, the pursuer's counsel stated that he desired judgment upon the record as it stands and without calling any other defender.

I think we must dismiss the action. I doubt if a discharged trustee is the proper defender. I am clear that he is not the only person that could be called.

LORD TRAYNER—The Lord Ordinary has expressed his opinion on several points in this case, regarding which I shall merely say that I am not to be held as concurring in them. But I agree with the Lord Ordinary in this, that the pursuer has not stated in his record any interest to prosecute this reduction. The only interest stated at the bar which the pursuer had to reduce the sequestration, assuming that interest to exist, is one with which the defender Mr Munro has no concern. The only interest therefore which is pretended is one in reference to which the pursuer has not

called the proper contradictor. On this point I concur with Lord Rutherfurd Clark.

The LORD JUSTICE-CLERK concurred.

The Court adhered.

Counsel for Reclaimer—Comrie Thomson—Cook. Agent—A. W. Gordon, Solicitor.
Counsel for Respondent — M'Kechnie — Kennedy. Agent—R. Broatch, Solicitor.

Tuesday, June 5.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

HUNTER *v.* MACNAUGHTON.

Reparation — Slander — Issue — Counter-Issue—Veritas.

In an action of damages for slander by an elder against the minister of a parish, the pursuer obtained an issue whether the defender had falsely and calumniously represented that the pursuer was addicted to taking strong drink to excess, and that this was notorious to the parishioners. The defender, who pleaded *veritas*, specified on record a number of occasions on which he alleged that the pursuer had been drunk in public places. The Court *allowed* as a counter-issue, whether the pursuer, from November 1887 downwards, was addicted to taking strong drink to excess, and whether this was notorious among the parishioners and congregation.

Observed that it would seem more consistent with our modern general practice to allow the issue to stand in general terms, the specific occasions legitimately falling within the inquiry being those of which notice had been given on record.

On 16th July 1893, in the course of a communion service in the Parish Church of Carsphairn, the Rev. George F. A. Macnaughton alluded to the absence of one of the elders John Hunter in these terms—"All present know the sad cause of the absence of one of my elders from his place this day, but I trust every member of the church will consider it to be his duty now, both by example and in every other possible way, to strengthen and encourage him to fight against his enemy,"—or made use of other or similar words of like meaning and effect.

Hunter thereafter brought an action of damages for slander against Macnaughton.

He averred—"(Cond. 4) The said statements . . . falsely and calumniously, maliciously, and without probable cause, represent that the absence of the pursuer from the communion service on Sunday 16th July 1893 was due to intoxication, and that he was in such a state of intoxication on that day that he was unable to attend church. Further, the said statements falsely, calumniously, maliciously, and without probable cause, represent that the pursuer was guilty of conduct unbecoming his position of an elder in the church and of his charactor of a Christian man; that the pursuer was accustomed to drink intoxicating liquors to excess; that he was an habitual drunkard; and that his character as a drunkard was notorious and was known to all the members of the congregation and the inhabitants of the parish."

The defender admitted that the statement he had made represented that the pursuer had on recent occasions been taking intoxicating liquor to excess, and that this failing was known to the congregation and inhabitants of Carsphairn. He averred that the statement was true, and specified at least thirteen occasions since 15th December 1887 on which he alleged the pursuer had been seen in public places either quite intoxicated or affected by drink to a degree unbecoming in an office-bearer of the church.

The defender pleaded—"(2) *Veritas.*"

On 22nd May 1894 the Lord Ordinary (STORMONTH DARLING) approved of the following issues for trial of the cause—"(1) Whether, on Sunday 16th July 1893, in the course of the communion service in the Parish Church of Carsphairn, and in the presence and hearing of the congregation then and there assembled, including William Buck and Mrs Isabella Hunter or Buck, both residing at Brockloch Cottage, Carsphairn, James Hunter, Legget, Carsphairn, and others, the defender did say—'All present know the sad cause of the absence of one of my elders from his place this day, but I trust every member of the church will consider it to be his duty now, both by example and in every other possible way, to strengthen and encourage him to fight against his enemy,'—or did use other or similar words of like import and effect? Whether the said statements are of and concerning the pursuer, and falsely and calumniously represent that the pursuer's absence from the communion service on said Sunday was due to intoxication, and that the pursuer was in such a case of intoxication on said Sunday that he was unable to attend church, or make similar false and calumnious representations of and concerning the pursuer, to his loss, injury, and damage? (2) Whether the said statements are of and concerning the pursuer, and falsely and calumniously represent that the pursuer was addicted to taking strong drink to excess, and that this was notorious to the parishioners of the said parish of Carsphairn, or make similar false and calumnious representations of and concerning the pursuer, to his loss injury and damage?"

The Lord Ordinary disallowed the following counter-issue proposed by the defender—"Whether the pursuer from November 1887 downwards was addicted to taking strong drink to excess, and whether this was notorious among the parishioners and congregation of Carsphairn"?

"*Note*—The Lord Ordinary has disallowed the counter-issue proposed by the defender