ure, which it is unnecessary to mention, the Lord Ordinary, on 6th March 1896, passed the note, and so the note of suspension became a pending action in this Court, and all these pleas became pleas in that action. Now, it is quite true that, although the bill might be a good and valid bill, it might not be a bill upon which summary diligence could be done, and accordingly, to avoid this difficulty and to bring the whole matter before the Court, the present pursuer brought the present action for payment of the amount alleged to be due under the bill. It appears to me that this is the material time to consider whether this Court has jurisdiction or not. If there was jurisdiction, then I do not think that the complainers can claim that anything which was done afterwards, by which the note was dismissed, can alter or affect the jurisdiction of the Court. That being so, I humbly think that the Lord Ordinary was right in the conclusion at which he arrived. As I have said, the suspension and the action relate to the same subject-matter, namely the liability of the defender on the bill, and beyond doubt there is the closest contingency between the two processes, and I think that that is enough to establish jurisdiction against the present defender.

With reference to the other pleas disposed of by the Lord Ordinary, as it is to be held that this Court has no jurisdiction, I have nothing to say in regard to them.

LORD M'LAREN—It is admitted that, apart from the effect of the previous action, the Court has no jurisdiction to try the question of the liability of the defender under this bill of exchange, and the action will fall to be dismissed, unless it can be maintained on the principle of reconvention.

Now, let me ask what is the meaning of reconvention? I do not understand that there is any dispute as to the nature of the jurisdiction so constituted. It means just this, that where a pursuer or complainer, being a foreigner, takes proceedings in the Court of this country, and thereby submits the matters in dispute to the judgment of the Court, he is not allowed to plead want of jurisdiction in any counter action which may be necessary for completely determining the rights of the parties which are in dispute. That being so, it does appear to me that there is no room in this case for jurisdiction on the ground of reconvention. Miss Cadman applied to this Court for protection against proceedings which were to be made effectual against her in England through the medium of a charge upon a warrant issuing from the register of deeds in Scotland. If an action had been brought against her in this Court she might have appeared and pleaded that the Court had no jurisdiction against her because she was resident in England; the contract was made in England, and nothing had been arrested to found jurisdiction against her. But the holder of the bill did not propose to proceed by way of action, but by summary execution. It appears to me that in taking this protective proceeding Miss Cadman was in exactly the same position as if she had appeared and pleaded want of jurisdiction in defence to an ordinary action. No doubt other pleas were stated in the note of suspension which she was prepared to argue in case her objection to the jurisdiction had failed, and if, after stating her plea to the jurisdiction, she had waived it and had gone on to discuss the merits of the dispute between her and the present pursuer, I do not say that the principle of reconvention might not have been applicable to any consequential action that might be found necessary. But as she was entitled to have the diligence stopped on the ground that the Court of Session and its Extractor of Decrees had no authority to issue summary diligence, it must be taken that the question of jurisdiction was the only question which could competently be tried. It was the question which the Lord Ordinary and the Court had to consider first in order, and when the conclusion was reached that the Court or its Extractor had no power to grant a decree against the complainer, the process of suspension attained its object and necessarily came to an end.

In these circumstances it seems to me that to apply the principle of reconvention to the new action is an impossible view, because it amounts to this, that if a person comes to this Court protesting against an attempted exercise of jurisdiction against him, he is by that very act held to have admitted the jurisdiction. I am unable to admit the validity of the reasoning that leads to this result, and I think, for the reasons stated, that the circumstances upon which Lord Adam has founded his opinion do not really exist in the case.

LORD KINNEAR concurred with the Lord President and Lord M'Laren.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for the Pursuer — Rankine — Ralston. Agent—Marcus J. Brown, S.S.C.

Counsel for the Defender—Shaw, Q.C.—Cook. Agents—Pringle & Clay, W.S.

Friday, January 15.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

BURNS' TRUSTEES *v.* WADDELL & SON.

Process—Reclaiming-Note — Competency — Interlocutory Judgment—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *secs.* 28, 53, 54.

An interlocutor of a Lord Ordinary which does not dispose of the question of expenses is not a final judgment in the sense of section 53 of the Court of Session Act 1868.

Baird v. *Barton*, June 22, 1882, 9 R. 970, *followed.*

A reclaiming-note against an interlocutor of the Lord Ordinary not falling within the provisions of section 28 of the Court of Session Act 1868, and presented without leave, will not be entertained by the Court even with consent of parties.

The trustees of the late Michael Burns, coalmaster, Edinburgh, tenants of Mauldslie coalfields, Lanarkshire, raised an action against their sub-tenants, Messrs Waddell & Son, coalmasters, Glasgow, concluding for relief of the sum of £550 claimed from the pursuers by the proprietor of the coalfield in respect of alleged damages caused by improper working, and resulting in the loss of certain quantities of coal. The action was sisted till the proprietor's claims were constituted by arbitration, as was required under the principal lease. The arbitration is still in dependence, but as regards the claim for lost coal the landlord offered to accept the sum of £275, along with one-half of the fees of arbiter and clerk in full of the claim. The defenders tendered these sums to the pursuers, and claimed on payment being made to be assoilzied. The pursuers, however, maintained that the defenders were bound to relieve them of their expenses in the arbitration as well as of the damages.

The Lord Ordinary (KYLLACHY) on 10th July 1896 pronounced the following interlocutor:—"In respect it is not disputed that the landlord Sir Windham Charles James Carmichael Anstruther has offered to accept payment of the sums mentioned in the minute of tender No. 20 of process, as in full of the claims to which this action relates, Finds that on payment or consignation of the sums tendered in said minute, the defenders will be entitled to absolvitor; and in order that such payment or consignation may be made, continues the cause.

The pursuers reclaimed without obtaining the leave of the Lord Ordinary, the reclaiming-note being boxed on August 13th. They argued that the reclaiming-note was competent, because the Lord Ordinary's interlocutor in effect disposed of the whole merits of the case on the footing of the tender. The respondents made no objection to the competency of the reclaiming-note, and expressed their willingness to discuss the case on the merits.

LORD PRESIDENT—In my opinion this reclaiming-note is incompetent, and it is our duty to dismiss it. The Court of Session Act 1868 says in peremptory terms that except in the way provided by the 28th section of the Act, until the whole cause has been decided in the Outer House, it shall not be competent to present a reclaiming-note against any interlocutor of the Lord Ordinary without his leave first had and obtained. By express decision of the Court in the case of *Baird* v. *Barton*, June 22, 1882, 9 R. 970, an interlocutor does not fall within that class unless it disposes of expenses, by which I mean, not that it decides the amount of expenses payable, but that it deals with and determines the question of the liability of one or other of the parties for expenses. Now, this interlocutor contains no such element, but is distinctly what may be called an interlocutory judgment. What then is our duty? The parties may think it convenient that we should go on and decide this question, but it does not fall within the scope of the official duties which we hold the Queen's Commission to perform. Our official duty is to try cases which are competently brought before the Court. This is not a case of that kind, and it would be contrary to our duty to spend time which is dedicated to lawsuits upon voluntary arbitration.

LORD ADAM—I am of the same opinion. The Legislature has laid down rules for the conduct of business in the Court of Session, and one of them is that a reclaiming-note against an interlocutory judgment of a Lord Ordinary, except within a certain time and subject to certain regulations, is incompetent. This interlocutor is shown, by the case of *Baird* v. *Barton*, to be not a final judgment but an interlocutory judgment. There was a mode by which within a certain time a reclaiming-note might competently have been presented if the leave of the Lord Ordinary had been obtained. The parties did not follow that course, and I am altogether adverse to the idea that we should proceed on the assumption that if the Lord Ordinary's leave had been asked he would have given it.

LORD M'LAREN—I quite appreciate the position which Mr Mackenzie has taken up, that he does not think that it is in the interests of his client to take exception to the reclaiming-note being proceeded with. It is unfortunate that the proper course has not been followed and the leave of the Lord Ordinary asked. If I may hazard an opinion, I have very little doubt that leave would have been given by the Lord Ordinary, for the interlocutor, if not technically, at least substantially, disposes of the whole merits of the case. But we are bound by the conditions of the statute, and as our attention was called to the omission we have no alternative.

LORD KINNEAR concurred.

The Court refused the reclaiming-note as incompetent.

Counsel for the Pursuers—Guthrie—T. B. Morison. Agent—P. Morison, S.S.C.

Counsel for the Defenders—C. K. Mackenzie — J. Wilson. Agents — Graham, Johnston, & Fleming, W.S.