Saturday, January 9.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

THE DUKE OF HAMILTON'S TRUSTEES *v.* WOODSIDE COAL COMPANY.

Process—Proof—Diligence for Recovery of Writs—Refusal of Diligence after Interlocutor Allowing Proof.

In an action of damages for encroachments brought by the proprietor and the tenant of certain minerals against the proprietor of a neighbouring coal-field, the defender averred, as a substantive and distinct defence, that the pursuers had committed encroachments on his property.

The Lord Ordinary allowed parties a proof of their averments, and his interlocutor was acquiesced in.

The defender then lodged a specification of documents which he sought to recover, and which *prima facie* were relevant to the averments on which his defence was founded.

The cause was meanwhile transferred to another Lord Ordinary, who refused diligence to the defenders in terms of their specification on the ground that the defence in question was irrelevant.

The Court *held* (*rev.* judgment of Lord Kyllachy) that diligence ought not to have been refused, and *remitted* to the Lord Ordinary to adjust the specification.

The Duke of Devonshire and others, testamentary trustees of the late Duke of Hamilton, and Messrs William Barr & Sons, colliery proprietors, North Netherburn, Lanarkshire, raised an action against The Woodside Coal Company and Joseph Hutchison of Woodside, Lanarkshire, the only known partner thereof, concluding for payment of £2000 to the first-named and £12,000 to the second-named pursuers.

The Duke of Hamilton's trustees were the proprietors and Messrs Barr & Sons the mineral tenants of North Netherburn, which marches on the north-west with Woodside, of which the defender Mr Hutchison was the proprietor.

The pursuers averred that near the north-west corner of North Netherburn there was a triangular area of coal belonging to North Netherburn, and that the defenders from a pit sunk in Woodside had "worked out part of the coal in the ell, and it is also believed and averred in the main seam in the said triangular area. . . . The workings of the said Woodside Coal Company in said triangular area extended to a distance of 120 yards or thereby into the lands and minerals of North Netherburn."

The pursuers further averred that in December 1894 the pursuers Messrs Barr & Sons proceeded to sink a pit in the triangle, and that the defenders shortly afterwards stopped pumping the water in the Woodside Pit, the result of which was to throw a heavier burden of water upon the pursuers' workings in the triangle.

"Cond. 4.—The said pit on North Netherburn lies to the dip of Woodside, and in consequence of the stoppage of pumping by the defenders before referred to, the said encroachments of the defenders have been filled with water, and the wastes flooded to about the level of the ell coal in Woodside Pit, with the result that the whole coal below the upper seam in the said triangular area, so far as not abstracted by the defenders, has been rendered unworkable, or at least unworkable to profit. The sinking of the pursuers' said pit beyond the upper coal in said encroached area has therefore been stopped, and the large cost thereof has in a great measure been abortive, to the loss and injury of the pursuers, the said William Barr & Sons."

The pursuers averred that the coal abstracted by the defenders from the ell seam amounted to 30,000 tons, while that abstracted from the main seam, together with what was rendered unworkable, amounted to 40,000 tons. They also averred that the defenders' encroachment and abstraction of coal were made recklessly and *in mala fide*, and in the knowledge that the workings were being carried on in the pursuers' coal.

The defenders admitted that encroachments had been made on the pursuers' minerals by their manager, without the knowledge of Mr Hutchison, and averred that Mr Hutchison on being informed by the manager of these encroachments, caused inquiries to be made as to the manner in which the minerals in Woodside and the neighbouring properties had been worked.

Stat. 3.—Mr Hutchison "discovered and alleges that for a number of years the tenants of the said minerals belonging to the Duke of Hamilton (including the pursuers Messrs Barr & Sons) have been in the habit regularly and systematically of encroaching upon the estate of Woodside, and abstracting minerals therefrom at such places as they found most convenient. These encroachments were known to and authorised by the pursuers, the Duke of Hamilton's trustees, or their authors, or by their agents, for whom they are responsible, and they received payment of large sums in name of royalties on account of the minerals which had been to their knowledge so abstracted from Woodside. So far as Mr Hutchison has been able to discover, no less than thirteen different encroachments have been made upon Woodside, and about 25,000 tons of coal have been abstracted from the said estate by the successive tenants of the Duke of Hamilton." The defenders then specified the several encroachments which he averred had been made not only from North Netherburn but also from Over Dalserf, the minerals of which had also been rented by Messrs Barr & Son from the Duke of Hamilton; and proceeded:—

"Stat. 4.—By the acts of the pursuers above condescended on, or some of them, the pursuers induced the defenders'

manager to believe that he was entitled to take minerals from the Duke of Hamilton's estate, in places where such minerals could be most conveniently or only worked from Woodside, and he accordingly made the encroachments upon the triangular area referred to in the present action. The minerals in that area were and are not workable to profit except from Woodside. The defenders' manager acted in good faith, and in accordance with the system of working established by the pursuers."

"Stat. 5.—The defenders believe and aver that the pursuers Barr & Sons, and also the pursuers the Duke of Hamilton's trustees, and the late Duke of Hamilton, whom the said pursuers represent, and the agents employed by them and him in connection with the said mineral field, have been aware for a number of years of the encroachments of which they now complain, and that their object in beginning to sink a pit in the said triangular area was to rear up a claim of damages against the defenders. They had no *bona fide* intention of working the said minerals, which, as has been already explained, could not have been worked to profit owing to the smallness of the area and the troubled condition of the field."

The defenders further averred that as a consequence of their encroachments the pursuers had sent a large quantity of water from their mineral field into the defenders' workings, and had thrown upon the defenders the burden of pumping to the surface the greater part of their underground water.

"Stat. 7.—The defenders are about to raise an action against the pursuers in respect of the encroachments and illegal actings above referred to."

The pursuers pleaded, *inter alia*—"(1) The encroachments and operations condescended on being wrongful and illegal, the defenders are liable to the pursuers respectively for the loss, injury, and damage they have thereby respectively sustained."

The defenders pleaded, *inter alia*—"(2) The defenders not having authorised the encroachment complained of, they are not liable in damages as concluded for. (3) In the circumstances stated, the pursuers are barred by their actings from claiming damages in respect of the said encroachments."

On 10th November 1896 the Lord Ordinary (STORMONTH DARLING) allowed the parties a proof of their averments.

The defenders then lodged a specification of documents called for by them. These documents all bore upon the defenders' main line of defence, viz., the averments of counter-encroachment by the pursuers, and it was not seriously disputed that they were relevant thereto. The specification included, *e.g.*, the following articles—(4) All returns of lordships paid to the Duke of Hamilton's trustees or their authors in respect of the minerals in North Netherburn or Over Dalserf during a specified period. (5) The books containing entries showing the output of minerals from (1st) Over Dalserf, (2nd) North Netherburn, and (3rd) Woodside, by the tenants of the coal on the first-named properties, and showing what royalties were received by the Duke of Hamilton in respect of coal worked from Woodside. "(6) All plans, tracings, reports, letters or correspondence relative to coals of Woodside worked by the pursuers or either of them, or by the late Duke of Hamilton, or by tenants of the said Duke or of the first-mentioned pursuers. (7) All books of the pursuers or either of them, or of the late Duke of Hamilton or of his tenants, containing entries relative to encroachments by them or any of them on the coals or minerals of Woodside, or of coal worked by any of them from Woodside, that excerpts may be taken therefrom of all such entries."

On 18th December 1896 the Lord Ordinary (KYLLACHY), to whom the cause had been transferred, pronounced an interlocutor in which, *inter alia*, he refused diligence to the defenders in terms of their specification, and granted leave to reclaim.

The defenders reclaimed, and argued—The Lord Ordinary was wrong in refusing the diligence. He had done so because he had doubts as to the relevancy of the defence. But the question of relevancy and of proof was not now before the Court. It had been disposed of by the interlocutor of the Lord Ordinary before whom the cause originally depended. He had allowed a proof, and that interlocutor, not having been reclaimed against within six days, was final under the 28th section of the Court of Session Act. The pursuers were not entitled to object to a specification of documents which it was not disputed were relevant to the averments of which a proof had been allowed—*Barr* v. *Bain*, July 17, 1896, 23 R. 1090, referred to.

Argued for the pursuers—The Lord Ordinary was right. Although a proof at large had been allowed, it was competent for the Lord Ordinary to limit it at any stage by eliminating irrelevant matter. Even on the assumption that some articles in the specification were relevant, the Lord Ordinary had taken the proper course in refusing it—*Silver* v. *Great North of Scotland Railway Company*, January 23, 1894, 21 R. 416. The defenders merely desired information to enable them to raise their threatened action.

LORD ADAM—This is an action brought by the proprietor of certain lands and his mineral tenants in these lands. These lands, as I understand, adjoin and are bounded by lands belonging to the defender, and the allegation upon which the action is founded is, that the defender, who also, through a tenant or manager, works the coal on his side of the march, has trespassed upon and removed coal from a particular area of ground, the property of the pursuer. The action is to recover the loss and damage so occasioned.

The defence is not a denial of the fact that the defender has, through his tenant or manager, here encroached upon and removed coal from the ground in question, but the defenders set up a distinct and

substantive defence, in support of which they make a series of statements of fact which culminate in pleas to the following effect:—that the defenders not having authorised the encroachment complained of they are not liable in damages, and that, in the circumstances stated, the pursuers are barred by their actings from claiming damages in respect of the said encroachments.

Now, the record was closed upon these averments. There seems to have been no discussion on the relevancy of the defence set up, and upon the 10th November 1896 the Lord Ordinary closed the record and allowed parties a proof of their averments on a day to be afterwards fixed. That allowance of proof was not brought before us by reclaiming-note. The question was raised before us, whether the present reclaiming-note entitles us to consider the interlocutor of 10th November, but no motion has been made to us by the Solicitor-General on the part of the pursuers in any way to modify or alter that interlocutor, and it appears to me that we must dispose of the question before us, namely, whether or not this specification should be granted, on the footing that the defenders are entitled under that interlocutor to prove all their averments—I mean all the averments relevant to support the distinct and substantive case which they have set up. For myself, if the matter of the relevancy of these averments in defence had been brought before us, it might or might not have been my opinion that one or more of them should not have been remitted to probation, but we are not in that position. The question now is, whether in the present position of the case we are entitled to assume that the whole of these averments are irrelevant, for that is what it comes to, and ought not to have been remitted to probation. I cannot say that that is so. If in the course of the defenders leading evidence in support of their case, any particular piece of evidence, whether oral or written, should not be relevant to support that case, that question is reserved under the ordinary procedure. But that is not the matter which we have now to consider, and in the position in which we are placed it appears to me that the Lord Ordinary was not entitled altogether to refuse this specification *de plano* as being unwarranted and inadmissible. I think the case ought to go back to him to adjust the specification.

LORD M'LAREN—This is an action of damages for encroachment by a mineral proprietor and his tenants against an adjoining proprietor, and the Lord Ordinary before whom the case was first taken made an order—I presume because he was not asked to take any different course—allowing to both parties a proof of their averments. Now, it is perfectly clear that such an allowance of proof leaves all questions of relevancy open to further consideration, and that the words "before answer," which are often inserted for the purpose of reserving questions of law and relevancy are unnecessary. It seems to me that, looking at the matter very strictly, as the relevancy is reserved, the question of relevancy might be raised at any subsequent stage of the case, and even on a motion for a diligence. At the same time, it is clear enough that that is a very inconvenient mode of starting a legal question, and that if the question is to be raised before proof or trial, the proper time for raising it is when the Lord Ordinary is moved to make an order for proof. In this case the action had been transferred to Lord Kyllachy from another Court, and his attention having been called to the defences, it was explained to us that his Lordship thought that the special defences were altogether irrelevant, and that there was no question for consideration except the amount of damages. In that view, as I understand, his Lordship rejected the specification. It appears to me that that was practically reversing the judgment of the Lord Ordinary, who had already allowed a proof; at all events, it amounts to a different mode of exercising the discretion which a Judge has before the trial of dealing with the relevancy.

A motion for a diligence is, as I have said, an inconvenient motion for raising questions of this kind, and I therefore agree with Lord Adam that the refusal of the defenders' specification on this ground cannot be maintained, and I am prepared to grant the diligence subject to adjustment, which counsel said could readily be done. I am the more disposed to take this course because the granting of the specification does not necessarily make the documents evidence in the case. It will still be open at the proof to object to any documents being put in evidence, and according to my view a document may be objected to upon the ground of want of relevancy, because if the Lord Ordinary has power, as he undoubtedly has, to dispose of any question of law or relevancy in giving judgment upon the case, it must be within his competency, if he has a clear opinion on the question, to exclude matter in the course of the proof, thereby keeping the case within proper bounds, and making his duty more easy when he comes to consider the effect of the evidence which he has allowed.

LORD KINNEAR—I agree with Lord Adam. I think that the interlocutor of the Lord Ordinary has decided, and for the purposes of this question finally decided, that the averments contained in the defenders' statement of facts are to be admitted to probation. Whether the interlocutor by which he remitted the whole averments of both parties to probation could be competently brought under the review of this Division now if the pursuers had taken advantage of the defenders' reclaiming-note, and maintained that that brought up the previous interlocutor, it is unnecessary to consider, because whether it could be so brought up or not, we have had no motion put before us to review that interlocutor, and therefore for the purposes of the present question it must be considered final.

I think that that interlocutor determines

the question of relevancy in this sense, that it decides that the averments of both parties on record are to be remitted to probation. It may still be a question, assuming them to be proved, what the effect of the facts set forth by the defenders ought to be upon the pursuers' claim. Whether it is open to the Lord Ordinary or not to decide that upon the merits the averments which he has remitted to proof are relevant or not relevant to affect the pursuers' claim, it would certainly be open to this Court to do so, because I presume that there can be no question that a reclaiming-note against a final interlocutor would bring up all the previous interlocutors. Therefore it appears to me that the question on the merits is unaffected by any decision we pronounce now, and that the question of what averments are to be remitted to probation is finally decided by an interlocutor which we are not asked to review. Upon that ground I think we must recal the Lord Ordinary's interlocutor refusing to allow the specification altogether. It will, of course, be open for his Lordship to determine what documents are recoverable by diligence on the assumption that the case alleged by the defenders has been sent to proof.

The LORD PRESIDENT concurred.

The Court recalled the interlocutor reclaimed against in so far as it refused diligence to the defenders in terms of the specification, and remitted to the Lord Ordinary to adjust the said specification and to proceed.

Counsel for the Pursuers—Sol.-Gen. Dickson, Q.C.—Deas. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defenders—D.-F. Asher, Q.C. — W. Campbell — D. Ross Stewart. Agents—Drummond & Reid, S.S.C.

Wednesday, January 13.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

DAVIS *v.* CADMAN.

Jurisdiction—Reconvention—Foreign.

A domiciled Englishwoman raised in Scotland a suspension of a threatened charge upon a bill. The object of the suspension was to prevent the holder from protesting the bill in Scotland, and proceeding, by the method provided in the Judgments Extension Act, to seize the suspender's effects in England. The suspender stated in her condescendence and pleas objections to the validity of the bill.

An action having been raised against her by the holder of the bill for payment of the amount thereof, *held* (*rev.* the judgment of Lord Kincairney, Lord Adam *diss.*) that the defender having in the suspension come to the Court, not of choice, but of necessity, and for the purpose of excluding its jurisdiction, the principle of reconvention did not apply to found jurisdiction against the defender.

Process—Summons—Bill of Exchange.

An action founded upon a bill of exchange, which is not libelled in the summons in conformity with the provisions of Schedule A of the Court of Session Act 1850 (13 and 14 Vict. c. 36), and relative Act of Sederunt, October 31, 1850, is *incompetent.*

This was an action at the instance of Joseph Davis, money-lender, 4 George Street, Edinburgh, against Miss Anna Margaret Cadman, Trinity Lodge, Denmark Hill, London, a domiciled English woman, concluding for payment of £200. This sum was claimed in respect of an alleged bill for £200, which the pursuer averred had been granted in his favour by the defender in return for a loan made to her sister. The bill founded upon was not libelled in the summons. The pursuer claimed that the defender was subject to the jurisdiction of the Court of Session *ex reconventione*, in respect that she had raised proceedings against him there, seeking to interdict him from doing summary diligence under the bill in question.

The note of suspension referred to was presented by the defender and her sister on 14th January 1896, and the prayer was in the following terms:—"May it therefore please your Lordships to suspend the proceedings complained of, and to interdict, prohibit, and discharge the respondent from noting, or protesting or charging upon, or taking any steps to enforce by diligence the payment of the sum of £200 bearing to be contained in and alleged to be due by the complainers under a bill for the sum of £200 bearing to be dated the 10th day of July 1895, and bearing to be drawn by the respondent upon the complainers, or of any part of the sum alleged to be due under said bill, and to grant interim interdict, or to do otherwise or further in the premises as to your Lordships may seem proper."

The reason which was given in the complainer's statement of facts for making this application was that certain other bills had been noted and protested by the present pursuer in Scotland; that he had extracted the protests and registered them in the Books of Council and Session, and that, having taken out a certificate of registration in terms of the Judgments Extension Act, he had proceeded, without notice to the complainers, to seize their furniture in England.

The complainers in the suspension process averred—(Stat. 4) "Upon 6th January 1896 the complainer Anna Margaret Cadman received an intimation from the respondent that an alleged acceptance by herself and her sister to him for £200 became due upon the 13th inst., and was payable at No. 4 George Street, Edinburgh. The complainers have ascertained that the said acceptance bears to be dated 10th July