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

1895, and to be signed by them, but it contains the name of no drawer. Its terms are referred to. It is explained and averred that at the hearing of this note before the Lord Ordinary on the Bills on 1st February 1896 the respondent voluntarily and deliberately produced said bill, founded upon it in support of his pleas, and lodged it in process as one of his productions. The Lord Ordinary on the Bills, after renewed discussion upon the terms of the bill, passed the note without caution, in respect that the bill was not signed by the person giving, and the respondent reclaimed against this judgment. He again founded upon the bill, which was still unsigned by any drawer, and was again unsuccessful. It cannot now be completed. It is not and never was a valid document of debt. The complainers received no value for said bill, and the whole of the indebtedness by them or either of them to the respondent's company was extinguished at the time when said compromise was effected. No sum has ever been received by the complainers, or either of them, from the respondent in loan, and no sum is now due by them, or either of them, to the respondent."

The complainers pleaded—"The respondent ought to be interdicted from proceeding to do diligence upon said alleged acceptance, in respect (*a*) that he is now seeking to enforce his rights under it by ordinary action; (*b*) that it was produced by the respondent in judgment while unsigned by him or any alleged drawer; (*c*) that it does not comply and cannot now be made to comply with the provisions of sec. 20 of the Bills of Exchange Act 1882; (*d*) that *ex facie* of the alleged bill the respondent has no right thereto; (*e*) that no value was received by the complainers for said bill; and (*f*) that no sum is due or payable by the complainers, or either of them, to the respondent."

The respondent having undertaken not to proceed by summary diligence, the note of suspension was on 5th June 1896, refused by the Lord Ordinary, and the complainers were found entitled to expenses.

The pursuer in the present action pleaded that in virtue of these proceedings, which were still pending at the date of the raising of the present action on 16th April 1896, the defender had rendered herself subject to the jurisdiction of the Court.

The Lord Ordinary (KINCAIRNEY) on 28th July 1896, pronounced an interlocutor by which he, *inter alia*, sustained this plea.

Opinion.—"The pursuer in this case is a money-lender, carrying on business in Edinburgh. The defender is an unmarried lady resident in England; and the pursuer seeks to recover from her the sum of £200, said to be due by a bill signed by the defender's sister Mary Loetitia Cadman, now bankrupt, and herself. The pursuer's averment is that he advanced to Mary Loetitia Cadman £175 upon the bill; that she agreed to get the name of the defender to the bill as her surety; that the defender signed the bill and handed it back to her sister Mary Loetitia Cadman, 'with authority to put the same in circulation and hand it to the pursuer, and which was so done.' Neither counsel was able to explain what was meant by the words 'to put the same in circulation.' The question on the merits is whether the defender is liable to pay the sum in the bill to the pursuer. Although the action is by a money-lender against an unmarried woman, the transaction may have been fair enough notwithstanding; and, of course, no prejudice or presumption can arise in the outset against the pursuer.

"Several preliminary questions of considerable difficulty and of some importance have been raised by the defender.

"The first plea is 'No jurisdiction,' the defender being an Englishwoman. This is met by the plea that the defender is 'subject to the jurisdiction of the Supreme Courts in Scotland *ex reconventione*.' I am not sure that this plea is quite correctly expressed; but the grounds of it are distinctly stated. It is rested on a note of suspension and interdict by the Misses Cadman against the present pursuer, in which they crave that the pursuer should be interdicted from noting or protesting or enforcing by diligence the bill which is now in question. In that case the note was passed in the Bill Chamber without caution, and the case was afterwards brought into Court and a record was made up and closed. It was in dependence when this action was brought, but the note was afterwards refused on the undertaking of the pursuer Davis not to proceed by summary diligence on the bill. I understand it is now out of Court.

"Now, the defender maintained that this action could not warrant the plea of reconvention. It was submitted that an action of reconvention was only permitted for the protection of a native defender in the primary action brought by the foreigner; and that here Miss Cadman was in substance the defender, although nominally the pursuer of that action; because the action was of the nature of a suspension of a threatened charge. But I think that was not so; for Davis had not protested the bill, and had never threatened to use diligence on it. I think the present defender must be held to have been one of the pursuers of that action, as she appeared on the face of the petition to be. Further, the defender contended that the plea of reconvention only arose where the two actions were of the nature of cross-actions, and where the one claim could not be set against the other. No doubt the plea of reconvention usually arises in such circumstances.

"Now, it does at first sight seem rather paradoxical to say that an action brought to prevent the enforcement of a bill by the pursuer should enable him to raise an action in this Court for the bill. The consequence was, I daresay, not contemplated by the defender.

"I am of opinion, however, in this case, that the plea of no jurisdiction is bad, and that the Court has power to entertain this action, and that in respect of the dependence of the former action when this action was brought into Court.

"If the former action had raised no other question than whether summary diligence could proceed on the bill, there might have been a good deal to say for the argument, that it could not support jurisdiction in this action. But if the record be referred to, it seems plain that it did more than that, because the whole questions on the merits were raised in that action, just as they are raised here. There was no doubt, another question, viz.—Whether the bill could warrant summary diligence? But the whole merits were raised, and the question whether the Misses Cadman were liable on the bill was submitted to the Court by the Misses Cadman themselves. That is to say, the present defender being one of the pursuers of that action, submitted to the Court the question whether she was liable for £200 under this bill. That is the question on the merits submitted in this action by Davis, the pursuer. The two actions are not about similar or connected matters, but about precisely the same matter; and I conceive that the defender having submitted to the Court that question, cannot now turn round and plead no jurisdiction when the same question is submitted by the pursuer. The case stands the test expressed by Lord Kinloch in *Thomson* v. *Whitehead*, 25th January 1862, 24 D. 331, 349, where he says—'I should be disposed to limit the admissibility to the case where there is such contingency as would make it proper that actions should be conjoined.'

"In *Morison & Milne* v. *Massa*, 8th December 1866, 5 Macph. 130, the Lord President says—'The broad principle is this, that a party appealing to the jurisdiction of the Court renders himself amenable to that jurisdiction, and eminently so in reference to the same matter of dispute.' It might be contended that the present defender, by her pleadings in the former action, had prorogated the jurisdiction of the Court to try the question of her liability under the bill; and there is high authority for the view that jurisdiction by reconvention is a species of prorogated jurisdiction, *per* Lord Deas, in *Morison & Milne* v. *Massa*, and in *Thomson* v. *Whitehead*. It does not greatly signify by what name the power of the Court to entertain the question is expressed.

"I am of opinion on the grounds expressed, that the defender is barred from objecting to the jurisdiction of the Court to decide the very question which she herself submitted in the previous case.

"It does not signify that the former action is, or may be now, out of Court—*Allan* v. *Wormser, Harris, & Co.*, 8th June 1894, 21 R. 866.

"I have felt a little difficulty arising from the statement by the pursuer on the record —'It is denied that the question of the defender's liability for the sum contained in said bill is competently raised, and can be determined in said process,' meaning the action of interdict. That is rather a plea in law than a statement of fact. It is extremely adverse to the pursuer's plea of reconvention, and I should have had much difficulty on the question of jurisdiction had I thought the proposition sound. But I do not think it sound. I think the question of the defender's liability could have been determined in the action of interdict, although I doubt whether the pursuer Davis could have got an efficient remedy in that action."

The defender reclaimed, and argued—This was not a case in which reconvention could be applied on the ground of appropriateness, for it would be much more convenient to try the case in the English Courts, the witnesses being resident in England. Nor did the principles apply upon which reconvention depended, as laid down in *Thomson* v. *Whitehead*, January 25, 1862, 24 D. 331. The defender had not convened the pursuer to this Court, but had come here in order to exclude the question of her liability on the bill from being decided except in the Courts of her own country, and to guard herself from being made the subject of summary diligence, which could be made effectual against her in her own country. It was clear from the case of *Thomson*, and from the opinion of Lord Rutherfurd Clark in *Allan* v. *Wormser, Harris, & Company*, June 8, 1894, 21 R. 866, at 874, that reconvention was substantially founded upon the implied consent of a foreign defender to have the questions at issue tried in this forum. It was impossible to imply that consent from proceedings intended to have the very opposite effect.

Argued for respondent—The defender had come to this Court for a remedy, and the theory of reconvention was that if anyone came to a Court for a remedy which it could afford him, then his opponent was entitled to detain him there for the decision of a cognate matter. This certainly was a cognate matter, for the whole question of the validity of the bill had been raised by the defender in her pleas and averments in her suspension process. But the pursuer had been unable to obtain his full remedies in a suspension, and had accordingly raised the present action. There certainly was such contingency as would make it proper to conjoin the two actions.

At advising—

LORD PRESIDENT—The defender is a domiciled Englishwoman, and unless she has in some way subjected herself to the jurisdiction of this Court in the matter of the present action, her plea of no jurisdiction must be sustained. The Lord Ordinary has repelled the plea in respect of the dependence, when this action was brought into Court, of an action at the instance of the defender, and of Miss Mary Loetitia Cadman, against the pursuer, in reference to the bill, the contents of which are now sued for.

Now, it is clear that the soundness of this reason must depend on the nature of the original action, for it cannot be affirmed as a general proposition that the mere fact that the first action had reference to the ground of action of the second will support the jurisdiction in the second. We must

see why the foreigner applied to this Court,—was it of choice, or of necessity? and what was it she asked the Court to do about this bill? The answer to these questions is to be found in the prayer of the note of suspension. The note asked the Court to interdict, prohibit, and discharge the present pursuer from noting or protesting this bill, or charging upon it, or taking any steps to enforce it by diligence. The reason for making this application, as set out in the statements of facts, was, that in relation to other bills, the present pursuer had noted and protested them in Scotland, had got the protests extracted and registered in the Books of Council and Session, and then taken out a certificate of registration in terms of the Judgments Extension Act, and had proceeded to seize the defenders' furniture in England.

Upon this I observe, first, that the proceeding of the defender in coming to the Scotch Courts was purely defensive and protective; and, second, that she came to the Scotch Courts, not by choice to try the question of her liability under the bill, but by necessity, because no other Court was competent to disarm her opponent of the weapon of summary diligence by stopping the Scotch procedure of noting, protesting, and registering in the Books of Council and Session. It is quite true that, being in the Scotch Court, the defender stated the pleas she had got against the validity of the bill; but this does not alter the nature of her suit. Indeed, the nature of the proceeding was finally adjudged by this Court, which, so soon as the pursuer judicially stated that he did not intend to do summary diligence, found it unnecessary to proceed with the action, and on that ground dismissed it.

Well now, where is the ground for holding that the dependence of a proceeding of this character at the time when the present action was raised precludes this Englishwoman from having her liabilities under this bill tried in the Courts of her own country, according to the ordinary rule of international law?

I do not think it is fair that, because this lady, obliged to come to the Scotch Courts to stop an illegal use of their process, went on to say that the bill was bad and would be bad even in an action, should be caught hold of as having "submitted to the Court" those questions, or as having "appealed to its jurisdiction" on the merits of this bill, for these are the phrases used by the Lord Ordinary. I think that the Lord Ordinary's own judgment of 2nd June 1896 much more accurately defined the scope of the defender's appeal to our jurisdiction. Accordingly, even assuming that the defender would be liable to our jurisdiction in the present action, if in the former action she had come into Court in order to get the validity of the bill decided and her action had somehow miscarried, I do not think that in fact she did so.

Again, it cannot be said that owing to the institution of the former action complete justice cannot be rendered if the ordinary rule be given effect to. No equity will fail if the action is tried in England, or would be furthered if it were tried in Scotland.

None of the cases cited by the pursuer seem to me to apply; and the principles laid down in the elaborate discussion of reconvention in *Whitehead* v. *Thomson* are, in my judgment, opposed to his argument.

I hold, therefore, that there is no jurisdiction; and in this view there is no room for the consideration of the other pleas discussed by the Lord Ordinary. It may be convenient, however, on a matter of practice, to note that the summons as it stands is clearly incompetent, as the bill is not libelled, the incompetency arising from the combined effect of 13 and 14 Vict. c. 36, Schedule A, and the Act of Sederunt, 31st October 1850, passed in virtue of section 1 of that Act. The proper course, as I conceive, had there been jurisdiction, would have been to allow the pursuer to state what amendments, if any, he proposed to make on the summons, and not to have disposed of any pleas (other than that of jurisdiction) before the summons was put in competent form.

LORD ADAM — The defender with her sister presented a note of suspension and interdict craving the Court to interdict the present pursuer from "noting, protesting, or charging upon or taking any steps to enforce by diligence the payment of the sum of £200 bearing to be contained" in the bill referred to. It is material to observe the grounds upon which the note was presented, and these are to be found in the fourth statement of facts for the complainers, where they say — "The complainers have ascertained that the said acceptance appears to be dated 10th July 1895, and to be signed by them, but the complainers have no recollection of signing said acceptance, and they believe and aver that said acceptance is not genuine, and was not signed by them. In any event, they received no value therefor, and the whole of the indebtedness by them, or either of them, to the respondents' company or to himself, was extinguished at the time when said compromise was effected, and no sum is now due by them, or either of them, to the respondent." The pleas to support the prayer of the note were—"The respondent ought to be interdicted from proceeding to do diligence upon said alleged acceptance in respect (*a*) that it was not executed by the complainers; (*b*) that no value was received by them therefor; (*c*) that all claims and demands at the instance of the respondent or his said company, were discharged under the compromise referred to upon record." It is material to my mind to observe that the complainers by their note of suspension raised the whole question of the validity of the bill, and it is clear to me that any judgment against the present pursuer sustaining any of these pleas would have been conclusive as to the validity of the bill. Now, that being the case as brought, and the grounds on which it was brought, what took place was, that after certain proced-

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.*