directly applicable here, and that there exist cogent reasons for refusing the present suspension. In the case of *Meek* the complaint was not directed, as here, against the whole system of assessment in the parish, but merely against the particular estimate, or mode of estimating the value of the property of the complainers. It was therefore not difficult to determine that matter, and to leave the subject of the actual money relief for readjustment among the rate-payers. But were the Lord Ordinary to adopt the views pressed upon him on the part of the complainer here, it must follow as a necessary result that the whole assessment for the year 1866–67 must be subjected to readjustment. No other course could, with justice to other rate-payers, be proposed. But is this to be allowed now, when the only consequence of refusing the suspension is to leave the present assessment to take effect meanwhile, as in former years, while the complainer is still free to adopt other measures adequate for the determination of the question which he has here raised, and at the same time free from the objections to which this particular form of process is open? The Lord Ordinary thinks otherwise, and that there are strong grounds on which to decline to sustain this process."

The complainers reclaimed.

J. C. SMITH (with him GIFFORD) maintained that suspension was a competent form of bringing the question before the Court, and that that was the form of action invariably adopted. He referred to the following cases—*Edinburgh and Glasgow Railway Co.* v. *Meek*, 10 Dec. 1864, 3 Macph. 229; *Glasgow Gas Light Co.* v. *Adamson*, 23 March 1863, 1 Macph. 727; *Edinburgh and Glasgow Railway* v. *Hall*, 19 Jan. 1866, 4 Macph. 301.

W. A. BROWN (with him CLARK) answered—The authorities quoted apparently support the competency of the action, but it does not appear from the reports that the objection was taken in the pure form in which it arises here. In these cases, the parties were apparently willing to try the question in a suspension, but here the respondents objected because that would be a highly inconvenient course. In *Tod* v. *Mitchell*, 26 Jan. 1858, 20 D. 445, where this objection was raised purely, the Court had laid down the principle of law applicable adverse to the suspender. But this question did not depend so much upon abstract considerations of law as on the circumstances of the case. The complainer had waited to the very last moment before taking his objection, and was not entitled to bring a suspension, and thereby impose a penalty upon future rate-payers, after the greater part of the assessment of the parish had been collected and paid for the relief of the poor. Moreover, the objections which the complainer was entitled to make up to the 5th of February were, in virtue of the 40th section of the Poor Law Amendment Act, mere errors or surcharges, not objections cutting at the principle of the assessment.

At advising—

LORD COWAN would have liked to have heard some of the cogent reasons referred to by the Lord Ordinary in his note. He says that it must be a necessary result of adopting the argument of the complainer that the whole assessment for the years 1866–67 must be subjected to readjustment, but no such thing happened, and that view had been properly passed from by the respondents. What was conclusive to him in the matter was, that while a great many cases had been quoted in which such questions had been tried by suspension, the respondents had not been able to lay their hands upon one in which a suspension had been imposed. He expressly reserved his opinion on the merits, and it might be that the pleas of acquiescence and homologation maintained by the respondents would throw out the action, but these questions could be competently tried in a suspension.

LORD NEAVES—Under the old law illegal assessment would be competently corrected by suspension, so far as the suspender was affected by the error; and the Act of 1845 studiously reserved to rate-payers the rights competent to them under the old law.

LORD JUSTICE-CLERK concurred.

The Court accordingly remitted to the Lord Ordinary to hear parties on the merits.

Agents for Complainer—Maitland & Lyon, W.S.

Agent for Respondents — Alexander Morison, S.S.C.

Tuesday, October 27.

NOTE FOR THEODORE RICHARD SCHWEITZER.

Diligence—Warrant to Arrest—Sheriff Officer—Messenger-at-Arms. There being no messenger-at-arms to put a warrant of arrestment into execution, authority granted to a sheriff officer to execute the diligence.

This note stated that the petitioner had obtained decree against the Earl of Orkney for a certain sum, with power to arrest, and prayed for warrant to a sheriff-officer to put the warrant into execution. The note stated that there was no messenger-at-arms resident in Orkney. The nearest was at Caithness, which was at a considerable distance, and there might be considerable delay. Under the recent Act, a sheriff-officer might serve a summons but not a diligence. The Court granted the authority prayed for.

Counsel for the Petitioner—Mr Pattison.

Agent—William Mason, S.S.C.

Thursday, October 29.

FIRST DIVISION.

LONGWORTH *v.* YELVERTON.

Jurisdiction—Foreign—Reduction—Status—Reconvention. A domiciled Irishman brought in the Court of Session a declarator of freedom and of putting to silence against an Englishwoman, who then brought against him a declarator of marriage. The actions were conjoined. Decree of declarator of marriage was pronounced by the Court (reversing the judgment of the Lord Ordinary), but the decision was reversed in the House of Lords. The Englishwoman then brought in the Court of Session a reduction of the judgments of the Lord Ordinary and of the House of Lords, on the ground that these Courts had no jurisdiction to pronounce then. Action *dismissed*, in respect that the defender was not now, or at the date of raising the action, subject to the jurisdiction of the Scotch Courts. *Opinion*, that the Courts of the country in which the parties are domiciled, will not be bound by any judgment of this Court and the House of Lords, which these tribunals can be shown to have had no jurisdiction to pronounce.

Maria Theresa Longworth brought this action against Major the Hon. William Charles Yelverton, for the purpose of reducing and setting aside certain judgments pronounced in this Court and in the House of Lords in the conjoined actions of putting to silence and declarator of marriage, which some time depended between the pursuer and the defender, and in which a final judgment was pronounced by the House of Lords in July 1864. The ground of reduction was that the Courts of Scotland, and the House of Lords sitting as a Court of Appeal in Scotch cases, never had jurisdiction to determine as to any marriage between the pursuer and defender, or to give them status, or to annul any marriage between them, by divorce or otherwise.

The Lord Ordinary (JERVISWOODE) dismissed the action, on the ground that the pursuer had not alleged any ground of jurisdiction of this Court over the defender sufficient to sustain the present process.

The pursuer reclaimed.

J. C. SMITH for reclaimer.

SOLICITOR-GENERAL (MILLAR) and WATSON for respondent.

At advising—

LORD PRESIDENT—The Lord Ordinary has sustained the first plea in law stated in defence, which rests on the allegation that the defender is not, and was not at the date of raising this action, subject to the jurisdiction of the Courts of Scotland.

It is beyond dispute, as far as this action is concerned, that the defender cannot be held subject to the jurisdiction of this Court *ratione domicilii*; for the pursuer states, and the defender admits (condescendence 7 and answers), that the defender is the son of an Irish Peer, and is by birth a domiciled Irishman; that he has not lost his Irish domicile; that he never had or acquired a domicile in Scotland; that during the few months that he spent in Scotland some years ago, he was engaged in military duty as an officer in the army.

It further appears that the defender is not now in Scotland, and was not so at the date of raising the present action, the summons being served only edictally. No fund or property has been arrested to found jurisdiction. The defender has no heritable estate in Scotland. The action does not concern or affect in any way heritage in Scotland. It is not founded on any contract made in Scotland. All the ordinary elements, therefore, which either simply or in combination give jurisdiction, are here altogether absent.

But the pursuer maintains that the very nature of the action is such that this Court must necessarily be competent to entertain it, though the defender is not personally subject to their jurisdiction. The object and effect of this action is to reduce and declare void certain judgments of this Court, affirmed in the House of Lords, affecting the status of the parties, pronounced on conjoined processes of declarator of marriage and of putting to silence, The single ground of reduction is, that the Court and the House of Lords had no jurisdiction to pronounce any of these judgments. The argument in support of the jurisdiction of the Court to try this case seems to be, that if the Court and the House of Lords did a great injustice or injury by assuming a jurisdiction which they did not possess, they are bound to undo that injustice or injury by reducing their former judgments, even though the defender in the present action is not subject to their jurisdiction. This is simply an invitation to the Court to repeat the excess of jurisdiction which they are said to have formerly committed; and if the former judgments be reducible on the ground of excess of jurisdiction it is obvious that any decree in this action would be equally reducible on the very same ground. If the defender were to be assoilzied from the conclusions of this summons of reduction, the pursuer would be hard to convince that this latter judgment of absolvitor would be more valid or effectual than the former judgments against her; for if a court has no jurisdiction to pronounce judgment condemnator, it has just as little to pronounce judgment absolvitor. And if, on the other hand, she should succeed in this reduction, the defender would surely have as good a right to challenge the decree of reduction against him on the ground of no jurisdiction, as the pursuer now has to challenge the previous judgments, or would have to challenge a decree ef absolvitor in this action. The slightest examination of this argument therefore shows its transparent fallacy, and indeed absurdity.

But the pursuer makes a further attempt to support the jurisdiction on the principle of reconvention. I had an opportunity, in common with all your Lordships, of expressing very fully my views of the application and effect of the principle of reconvention as received in the law of Scotland in the recent case of *Thomson* v. *Whitehead*. There can therefore be no need for repeating my opinion now; but it seems to me that to sustain our jurisdiction on the ground of reconvention on the present occasion would be quite inconsistent with the doctrines finally established by that case.

The pursuer's counsel, in the course of his argument on reconvention, seemed at a loss whether to represent this reduction as a process of review of the former judgments or as a separate and independent proceeding. If it were a process of review, I am not sure that the pursuer's position would be improved. But this at least may be stated as clear, that if it were a process of review, the principle of reconvention would be quite inapplicable.

But this is not a process of review. The pursuer does not ask for a reconsideration of her cause on its merits, but, on the contrary, demands reduction of the former judgments on the ground of fundamental nullity for want of jurisdiction. The conjoined processes in which these judgments were pronounced are now extracted processes finally taken out of this Court, and incapable of being ever revived in any form or to any effect. Can the principle of reconvention be applied to sustain this action in such circumstances? I am clearly of opinion that it cannot. The principle or rule of practice is founded on considerations of equity, and was adopted out of favour to defenders, that they might not be condemned to pay to a pursuer without an opportunity of enforcing their counter claims against him. The object and end of the rule is to have two cases tried in the same court, and contemporaneously, which it is both just and expedient should be so tried and brought to a conclusion. But in the present case, the previous proceedings being finished and finally out of court, and incapable of being revived, the whole foundation of reconvention is wanting. The parties have no longer any connection with Scotland, and are just as little known to this Court (except historically) as if they never had been suitors before it.

Whether under all circumstances it is necessary, in order to let in the doctrine of reconvention, that the defender in the suit shall be at the time of the institution engaged in another litigation in the

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

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

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

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

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

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

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

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

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

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

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

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

Thursday, October 29.

ANDERSON AND OTHERS *v.* COLVILE.

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

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

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