interlocutor complained of: Find the expenses incurred since the date of the Lord Ordinary's interlocutor payable as follows—The expenses incurred by Dr Traill to be paid by Smith's trustees, and the expenses incurred by Ballantyne's trustees to be paid by Dr Traill; and remit to the Auditor to tax the same and to report, and decern."

Counsel for Pursuer—R. V. Campbell. Agents—Maitland & Lyon, W.S.

Counsel for Smith's Trustees—Dean of Faculty (Watson)—Pearson—Guthrie. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Ballantyne's Trustees—Balfour—Low. Agents—W. & J. Cook, W.S.

Saturday, June 3.

FIRST DIVISION.

[Lord Craighill, Ordinary.

CLARK *v.* KIRKWOOD (M'ALLISTER'S TRUSTEE).

Process — Reclaiming Note—Leave of Lord Ordinary—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *secs.* 27, 28, *and* 54—*Act of Sederunt, March* 10, 1870, *secs.* 1 *and* 2.

An interlocutor renewing an order for proof may be reclaimed against, under the Court of Session Act, 1868, secs. 27, 28, and 54, and Act of Sederunt of March 10, 1870, without the leave of the Lord Ordinary.

In this case, which was an action for payment of a law agent's accounts, the Lord Ordinary upon 15th March 1876, allowed both parties a proof of their averments. Upon 18th March the accounts sued for were, on the defender's motion, and of consent of the pursuer, remitted to the Auditor to tax and report. On the report being made, objections were lodged, and upon 30th May the Lord Ordinary, after hearing parties, pronounced an interlocutor finding, *inter alia*, "that the necessity for a proof is not obviated by said taxation, ... therefore renews the order for proof," &c. The defender asked leave to reclaim against this interlocutor, which the Lord Ordinary refused. A reclaiming note was thereupon presented to the First Division, and on the case being called in the Single Bills the pursuer objected to its competency.

At advising—

Lord President—Proof was allowed in this case by the interlocutor of 15th March 1876, and if by the interlocutor of 30th May the Lord Ordinary had merely appointed the proof to proceed that interlocutor would not have been reviewable under the Court of Session Act of 1868, or the Act of Sederunt of March 10, 1870; and it would not have been a six days' interlocutor. But by the second interlocutor the order for proof is renewed. It appears to the Court that an interlocutor renewing an order for proof imports an allowance of proof of new, and therefore is an interlocutor which may be reclaimed against without leave.

Lord Deas, Lord Ardmillan, and Lord Mure concurred.

Counsel for Pursuer (Respondent)—Strachan. Agent—George Begg, S.S.C.

Counsel for Defender (Reclaimer)—Pearson. Agents—Rhind & Lindsay, W.S.

Tuesday, June 6.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

NISBET *v.* SMITH.

Contract — Essential Error — Advertisement—Feu-Duty.

N advertised his house for sale, "feu-duty £9," and further directed intending purchasers to his agents, "in whose hands are the title-deeds." S purchased the house "as advertised" without further inquiry, and entered into possession. When the disposition came to be prepared it was found that the £9 in use to be paid by N consisted of £5 feu-duty and £4 ground-annual, being the proportion effeiring to this house of certain larger burdens extending over a larger piece of ground of which this house formed a part, which burdens had never been regularly allocated.

In an action at instance of N to compel S to implement the contract by taking a disposition, S refused to take any disposition unless he were either guaranteed from any greater payment than £9, or the burdens were regularly allocated.

Held that S was not justified in his refusal, in respect that (1) the advertisement imported the titles into the contract, and did not essentially misrepresent the true state of matters; and (2) that S had never examined the titles though invited to do so.

This was an action at the instance of John Nisbet, salt merchant, Glasgow, against Alexander Smith, commission agent there. The pursuer concluded for implement of a contract of sale entered into on 24th March 1875, whereby the defender agreed to buy, and the pursuer to sell, "Jane Villa," and the ground on which it stood at Pollockshaws, the ground being in extent about an acre, and forming part of a plot of ground 6½ acres in extent, originally feued by Sir John Maxwell of Pollock to James Connell at a feu of £32, 19s., and of which 3½ acres were subsequently disponed by Connell under a ground-annual charge of £14, of which 3½ acaes the acre upon which 'Jane Villa' stood formed a part. Further, the summons concluded for relief from the contract in event of non-implement by the defender's failure to pay £1200 to the pursuer, with reservation of the pursuer's claims for damages. The pursuers averred that since his purchase of the property in 1866 he had paid £5 feu-duty and £4 ground-annual yearly, and that in March 1875 he advertised the villa for sale in the following terms:—"To be sold by public roup, in the Faculty Hall, St George's Place, Glasgow, on Wednesday, 31st March 1875, that villa known as Jane Villa,

Kennishead, near Glasgow, and situated about three minutes' walk from the railway station. It contains dining-room, drawing-room, parlour, three bed-rooms, kitchen, bath-room, and W.-C. The villa is supplied with gravitation water. There is considerable accommodation outside, including tool-house, &c. The villa has a southern exposure. The ground is thoroughly drained, and extends to one imperial acre. There is a flower garden, beautifully laid out; also a kitchen garden, fully stocked with berry bushes and fruit trees. Everything in the best order. Feu-duty, £9. For further particulars apply to W. R. Buchan, writer, 112 West Regent Street, Glasgow, in whose hands are the title-deeds and articles of roup."

After one or two meetings between the pursuer and defender, the defender made this offer to the pursuer on 24th March 1875—"I hereby make you the offer of Twelve hundred pounds for 'Jane Villa,' at Kinnishead, as advertised—possession at Whitsunday 1875." This was *eo die* accepted as follows by Mr Nisbet—"Your offer of Twelve hundred pounds for 'Jane Villa,' &c., as advertised by me, I hereby accept."

Thereafter the agent for the pursuer sent his title-deeds to the defender's agents, and a draft-disposition was prepared by them and revised by the pursuer's agent. The defenders, however, refused to go on with the transaction, alleging that the pursuer, although repeatedly required, refuses to get the feu-duty and ground-annual above referred to, or either of them, allocated, so as to limit the amount for which the property in question shall be liable to £9 per annum, or to take any steps for that object, or to insert a clause in the disposition warranting the defender against the ultimate payment of a larger sum than £9 per annum.

It was admitted that the defender was allowed to enter at Whitsunday 1875, and that he had since lived in the villa.

The pursuer pleaded, *inter alia*—"(1) The defender having entered into a contract for the purchase of the subjects above mentioned, he is bound to implement and fulfil the same by making payment of the price, and accepting of a disposition from the pursuer. (2) The defender having, on the faith of his implementing the said contract, been allowed to enter into possession of said subjects, he is bound to pay the price with interest and accept the disposition. (3) In the event of the defender failing so to do within such time as the Court shall direct, the pursuer will be entitled to decree of declarator that the contract is no longer operative or binding on the pursuer, and otherwise as concluded for. (4) The pursuer, in respect of the facts above set forth, and of the legal rights and liabilities of the parties in the premises, is entitled to decree in terms of the conclusions of the summons."

The defender pleaded, *inter alia*—"(2) The pursuer is bound in the circumstances stated to obtain an allocation of the gross feu-duty and ground-annual, or to insert a clause in the disposition in such terms as to limit the annual sum ultimately affecting the property in question to £9, and to get the deed referred to sufficiently stamped. (3) The defender having always been ready to fulfil his part of the contract on the pursuer's implementing the obligations incumbent on him, the defender ought to be assoilzied."

The Lord Ordinary pronounced the following interlocutor and note:—

"*Edinburgh, 5th January* 1876.—The Lord Ordinary, &c. . . . *Primo*—Finds that it is admitted (1) That the plot or area of ground libelled, which belongs to the pursuer, is part of subjects of greater extent which are burdened with a *cumulo* feu-duty of £32, 19s. per annum, and a duplicand thereof every nineteenth year, payable to the superior, and with a ground-annual of £14 per annum, with a duplication of the like amount every nineteenth year; (2) That there has been no allocation by the superior or the party in right of said ground-annual of any proportion of said feu-duty and ground-annual upon the plot or area of ground libelled; (3) That the pursuer in March 1875 advertised for sale the said plot or area of ground which is now known as 'Jane Villa,' and in his advertisement stated the feu-duty to be £9; (4) That by missive offer and acceptance, both dated 24th March 1875, the defender offered to purchase, and the pursuer agreed to sell to the defender, the said subjects as advertised by the pursuer, at the price of £1200 sterling, with entry at Whitsunday 1875: *Secundo*—Finds that the said offer and acceptance imply that the defender as purchaser, should for the said price to be paid by him acquire and hold the said plot or area of ground subject to no feu-duty or ground-annual payable to any person, greater than the said annual sum of £9, and therefore that the pursuer is bound to convey the same to the defender freed from the burden of all feu-duties and ground-annuals in excess of said annual sum of £9, or secured against the effect of liability for such feu-duties and ground-annuals: *Tertio*—Finds that the defender is willing to implement his part of the transaction, provided the said *cumulo* feu-duty and ground-annual are to the extent of £9 allocated upon said area or plot of ground by the superior and party in right of the ground-annual, or provided the pursuer shall in the disposition to be granted by him warrant the defender against the ultimate payment of a larger sum than £9 per annum; and before further answer appoints the cause to be enrolled that the pursuer may state in what manner he proposes to implement his obligation in reference to said feu-duty and ground annual: Meantime reserves all questions of expenses.

"*Note.*—The circumstances in which this action has been raised are fully explained by the findings in the first branch of the foregoing interlocutor. The defender in purchasing the subjects plainly relied on the pursuer's statement in the advertisement that the feu-duty was £9; and he is not said to have known that this was an unallocated part of a *cumulo* feu-duty and ground-annual of £46, 19s. which affected the entire subjects of which the plot or area purchased forms a part. Indeed, the pursuer himself avers that the defender made his offer without either seeing the titles or applying for information to the pursuer's agents, to whom reference was made in the advertisement. The pursuer, however, maintains that the defender is bound to accept a disposition of the lands without any allocation of the feu-duty and ground-annual being made, or without any obligation being