the 27th section or under the corresponding sections of the Act of Sederunt of the 10th March 1870. I think it is the clear meaning of the Act of 1868 that an interlocutor granting diligence for the recovery of documents is not within the 27th or 28th sections, or within the corresponding sections of the Act of Sederunt which followed. It is an interlocutor which neither allows nor refuses proof, and which has no effect except to bring before the Lord Ordinary certain documents which may or may not be received in evidence or turn out to be admissible or not. The policy of the statute is to prevent reclaiming-notes against such orders as these, and although the refusal of leave to reclaim may in special circumstances be attended with hardship, the general policy of the statute requires the strict application of the rule unless the case is one falling within section 28 of the statute. I am therefore of opinion that we should refuse this reclaiming-note as incompetent.

LORD SHAND—One of the leading purposes of the Act of 1868 was to put an end to the mischievous number of appeals which used to be taken against interlocutory judgments with the result of creating expense and delay, and accordingly I think full effect must be given to the 54th section of the Act. There has been, it seems, some looseness of procedure on the question of discussion, because in several cases similar reclaiming-notes to the present have, it is said, been entertained. The question was certainly not made matter of discussion in these cases.

Section 54 of the Act of 1868 directly enacts that no appeal shall be allowed against interlocutory judgments without leave, except as provided in section 28. Section 28 referred to the provisions of section 27, which has been substantially repeated, the 1st section of the Act of Sederunt of 1870 being substituted therefor. In the Act of Sederunt all that is provided for is the fixing of the mode of inquiry or the refusal or postponement of inquiry, and therefore the 28th section only allows reclaiming-notes on six days with reference to that particular class of interlocutors.

The interlocutors before us are not of that class. Proof has been allowed, but the interlocutor reclaimed against is not the interlocutor allowing it, but an interlocutor pronounced in the course of carrying out such proof. Mischief may probably result from reclaiming-notes not being entertained in such cases, but the balance of convenience is in favour of restricting the number of reclaiming-notes. No doubt the Lord Ordinary, if he sees that the effect of his interlocutor may be very serious for one of the parties, will have in view that the only mode of review is by his giving leave, and will give leave accordingly. Here it appears he was satisfied that he should not grant it.

LORD ADAM concurred.

LORD M'LAREN—I agree in thinking that one of the principles running through the statute of 1868 is the discountenancing of appeals in interlocutors concerned merely with the regulation and conduct of the case; and I think we are all agreed that it is intended, where an interlocutory order deals with the merits, to provide for appeal, the condition being that the party desiring to appeal should satisfy the Lord Ordinary that there is a question involved in the interlocutor beyond the mere progress of the case. The question of granting or refusing leave is considered in that sense, and therefore it seems to me that the statute gives a complete remedy against accidental injustice. The granting an order to recover documents can never prejudice the merits of a case, and does not entitle a party to obtain leave to reclaim.

The Court refused the reclaiming-note as incompetent.

Counsel for the Pursuer and Reclaimer—Low—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Defender and Respondent—C. S. Dickson. Agents—Tods, Murray, & Jamieson, W.S.

Friday, May 16.

FIRST DIVISION.

[Sheriff of Forfarshire.

CLARK *v.* CLARKES.

Process—Appeal—Removing—6 Geo. IV. c. 120, sec. 44.

Section 44 of the Act 6 Geo. IV. c. 120, enacts that . . . "When any judgment shall be pronounced by an inferior Court ordaining a tenant to remove from the possession of lands or houses, the tenant shall not be entitled to apply as above by bill of advocation to be passed at once, but only by means of suspension as hereinafter regulated." The process of advocation was abolished and appeal substituted by the Court of Session Act 1868 (31 and 32 Vict. c. 100), secs. 64 and 65.

An action was brought by George Clark for warrant to eject David Wilkie Clarke and James Clarke from certain premises purchased by the pursuer from the trustee on the cessioned estate of David Wilkie Clarke. The defenders resisted the action on the ground that the "pretended sale" to the pursuer had been irregular, and in breach of the Cessio Acts and relative Acts of Sederunt, and was null and void. The Sheriff-Substitute repelled the defences and granted warrant of ejection, and on appeal the Sheriff adhered.

The defenders having appealed to the Court of Session, objection was taken to the competency of the appeal on the ground that the only mode of review was by suspension. The Court *held* the appeal competent, in respect that the appellants were not "tenants."

Counsel for the Pursuer and Respondent —W. Campbell. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Defenders and Appellants —G. Miller. Agent—Robert D. Ker, W.S.

Tuesday, May 20.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

BENNIE AND ANOTHER *v.* COUPER.

Contract—Essential Error—Consensus in idem.

A firm of law-agents wrote with regard to the payment of a sum of money contained in a bond and disposition in security—"Let us know if you undertake to see the money paid at Whitsunday first, as if you cannot we shall call up the bond in the usual way by notarial intimation." They received the following reply, "I undertake to see the money paid at Whitsunday first," and abstained in consequence from giving notarial intimation. *Held* that the sender of the reply was bound to pay the money, although he averred that at the time when he wrote he was under essential error as to the property in question, having in his mind another property of a similar name.

James Bennie, nail manufacturer, Glasgow, and Mrs Grace Gordon Jessie Barnhill or Bennie, wife of John Bennie, nail manufacturer, Glasgow, as the said Mr and Mrs John Bennie's marriage-contract trustees, became creditors in a bond and disposition in security for £1390, granted by Andrew Goodall, builder, Glasgow, to the trustees of the late James MacLellan, manufacturer, Glasgow, over certain subjects in Windsor Circus, Glasgow, in the parish of Govan and shire of Lanark. Over these subjects the Property Investment Company of Scotland held a postponed bond and disposition in security, in virtue of which they had entered into possession, paying Mr and Mrs Bennie's marriage-contract trustees the interest on their prior bond. Of the said company Mr Peter Couper, accountant, 37 George Street, Edinburgh, was manager, and as trustee for the company held certain bonds and dispositions in security over houses in Windsor Quadrant, Glasgow.

On 9th February 1889 Messrs Mack & Grant, S.S.C., Edinburgh, agents for Mr and Mrs Bennie's marriage-contract trustees, wrote the following letter to Messrs Couper & Cook, of which firm Mr Peter Couper was a partner:—

"*Mrs Bennie.*

"Dear Sirs,—We beg to give you notice that Mrs Bennie, Lynwood, Lenzie, formerly Miss Barnhill, requires payment at Whitsunday first of the bond for £1390 granted by Mr Andrew Goodall, builder, Glasgow, to Mr MacLellan's trustees, and now held by her, over subjects in the parish of Govan. Please let us know if you undertake to see the money paid at Whitsunday first, as if you cannot we shall call up the bond in the usual way by notarial intimation."

To which they received the following reply:—

"*Windsor Circus, Glasgow.*

"Dear Sirs,—I duly received your letter of 9th inst. addressed to my firm, and beg to accept your notice that Mrs Bennie, Lynwood, Lenzie, formerly Miss Barnhill, requires payment at Whitsunday first of the bond for £1390 granted by Mr Andrew Goodall, builder, Glasgow, to Mr MacLellan's trustees, and now held by her, over subjects in the parish of Govan, and I undertake to see the money paid at Whitsunday first."

In June 1889 Mr and Mrs Bennie's marriage-contract trustees raised an action against the said Mr Peter Couper for payment of £1390, with interest from Whitsunday 1889.

The pursuers pleaded—"The defender having by the guarantee libelled personally undertaken to pay at the term of Whitsunday last 1889 the amount due under the said bond and disposition in security, and having failed to do so, the pursuers are entitled to decree against him as concluded for, with expenses."

The defender explained "that the Property Investment Company of Scotland (Limited), of which the defender is manager, is interested in two blocks of property situated in adjoining streets, Windsor Quadrant and Windsor Circus, Glasgow, being part of the Kelvinside estate. The property in Windsor Quadrant was acquired by the said company from the feuar, and the title taken in the defender's name as trustee for the said company. The defender, as *ex facie* the proprietor, is the obligant in five different bonds and dispositions in security over the five houses forming the Windsor Quadrant subjects, the said company being bound to relieve him of the obligations so undertaken. The house in Windsor Circus which is covered by the pursuers' bond is one of other six houses over which the said company holds a postponed bond, and over each of which there are separate bonds to private lenders, the particular subjects in question being burdened with the bond for £1390, in right of which the pursuers now are. The company at or about Whitsunday 1879 entered into possession of said subjects, and the defender's firm of Couper & Cook has since managed this property, as well as the Windsor Quadrant subjects, on behalf of the said company, drawn the rents, and paid the interest upon the pursuers' said bond. Neither in connection with the subjects of the pursuers' security in Windsor Circus nor with the property in Windsor Quadrant has the defender any personal interest whatsoever. When the defender received the letter of the pursuer's agents of 9th February 1889, not having the facts above mentioned and the distinction between the position of the property in Windsor Quadrant and that in Windsor Circus clearly before his mind, and being misled by the terms of the said letter, and