SUMMER SESSION, 1890.

COURT OF SESSION.

Wednesday, May 14.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

SIR A. D. STEWART *v.* KENNEDY.

(*Ante*, p. 469, vol. xxvi. p. 625; and 16 R. 857.)

Process—Leave to Reclaim — Interlocutor Granting Diligence for Recovery of Documents—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *secs.* 27 *and* 28; *and Act of Sederunt*, 10*th March* 1870, *secs.* 1 *and* 2.

Held that an interlocutor granting a diligence for recovery of documents could not be reclaimed against without leave of the Lord Ordinary.

In this action the Lord Ordinary (KINNEAR) on 19th March 1890 pronounced the following interlocutor:—"The Lord Ordinary grants diligence against havers at the defenders' instance for recovery of the documents and others in the specification, No. 16 of process, as amended at the bar, and commission to Mr Hugh J. E. Fraser, advocate, to take the oaths and examinations of the havers, and receive their productions, to be reported *quam primum:* Further, refuses the defenders' motion for an inspection of the estate in question."

The pursuer having reclaimed, the defender objected to the competency of the reclaiming-note.

Argued for the defender—In this case the mode of proof had been settled by the interlocutor of the First Division, which applied the judgment of the House of Lords, and appointed the issues for the trial of the cause. The present interlocutor was merely incidental to the carrying out of the proof which had been allowed, and was not reclaimable without leave—Court of Session Act 1868, sec. 54; *Reids* v. *M'Phedran*, November 1, 1881, 9 R. 80 (Lord Craighill, p. 85). In the case of *Steven* v. *Nicoll, &c.*, January 9, 1875, 2 R. 292, leave to reclaim was asked, and as a matter of fact granted after a long discussion. *Quin's* case was distinctly treated as one which settled the mode of proof. In Sheriff Court procedure a decree of this kind was allowed to pass, and then on appeal the question was brought up with the whole case.

Argued for the pursuer—This was an interlocutor which fell within the class of interlocutors fixing the mode of proof, as the Lord Ordinary had by it granted an exceptional allowance of proof. It could therefore be reclaimed against without leave within six days, just in the same way as an interlocutor ordering a remit to a man of skill—Court of Session Act 1868, sec. 28; Act of Sederunt, March 10, 1870, sec. 1; *Quin* v. *Gardner & Sons*, June 22, 1888, 15 R. 776. At another stage of *Quin's* case, which was unreported, a reclaiming-note against an interlocutor granting a diligence had been entertained by the Court, though leave to reclaim had not been granted.

At advising—

LORD PRESIDENT—There can be no doubt that one object of the Court of Session Act of 1868 was to prevent the presentation of reclaiming-notes in questions of procedure before the Lord Ordinary. The mere regulation of the conduct of a case, it was thought, should not be interrupted by reclaiming-notes against interlocutory judgments, and the section of the Act of 1868 which particularly gives effect to that view is the 54th section, which provides that "until the whole cause has been decided in the Outer House, it shall not be competent to present a reclaiming-note against any interlocutor of the Lord Ordinary without his leave." This is subject to one exception—but to one exception only—and that is, "except in so far as otherwise provided by the 28th section hereof." The question therefore is, whether the present case falls within the 28th section of the statute. That section appears to me to apply only to questions which arise upon

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."