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.

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*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.

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*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

granted by the pursuer to relieve him of the surplus feu-duty and ground-annual, and that if the defender refuses to accept such a disposition the bargain must be cancelled. I am of opinion that none of the pursuer's contentions can be sustained. The statement in the advertisement was, in my opinion, a warranty by the pursuer either that the subjects were free from all annual prestation, such as feu-duty or ground-annual, except to the extent of £9 per annum, or that he (the pursuer) would free them of all such liability beyond that sum. And I am further of opinion that the pursuer is not entitled to have the contract cancelled. He has not stated any relevant case to support such a demand; and his own statement of the transaction between him and the defender implies that by the offer and acceptance he became bound to hand over to the defender 'Jane Villa' free from all feu-duty, &c., beyond £9. And the pursuer is bound to implement that obligation either by obtaining a proper allocation of the feu-duty and ground-annual before the defender pays the price, or by inserting in the disposition a proper clause of relief. The defender is willing to settle the transaction on either footing, and if an allocation cannot be procured he will be content with the insertion in the disposition of a clause binding the pursuer and his representatives in warrandice against the ultimate payment of a larger sum than £9 per annum. This I think a most reasonable proposal; and the case is ordered to be enrolled that the pursuer may state which alternative he proposes to adopt. The present case is in all material points ruled by the decision in *Paton* v. *Stuart*, 11th March 1825, 3 Sh. 457. No question has been raised by the parties, or can, in my opinion, properly arise between them in reference to the duplication of the *cumulo* feu-duty and ground-annual. The defender must be held to have purchased the subjects on the footing that they were liable to the casualty of composition either taxed or untaxed, and it will remain for him to arrange, after the disposition is finally completed and delivered, for the allocation of the said duplications if he can prevail upon the superior and party in right of the ground-annual to make the same."

The pursuer reclaimed, and argued—There is a difference between a representation inducing the terms of a contract and one not an essential of it—[Lord Justice-Clerk—If a bargain is induced by fraud or misrepresentation, the party deceived can either hold the article and claim damages, or reject it and put an end to the bargain]—*Mackenzie*, 3 Paton, App. 378; *Gilmore* v. *Hart*, 2d December 1875, 13 Scot. Law Rep. 105.

Argued for the defender—The defender is entitled either to a disposition securing him against paying above £9 feu-duty, or to get the whole feu-duty allocated over the whole property. What is the contract? The seller had complete knowledge, and so was bound to be distinct. The natural construction of the advertisement is that he named £9 as the maximum of the feu-duty. There is no statement on record by the pursuer that he cannot fulfil his contract. Authority—*Paton* v. *Stuart*, 11th March 1825, 3 S. 457, and Lord Ordinary's note there.

At advising—

Lord Justice-Clerk—This case has been ably argued and I have varied in opinion during the course of the argument, but I now think that it is quite certain that the interlocutor of the Lord Ordinary should be recalled. The contract here was not complete in its terms, or at least the titles were imported into it. The description in the advertisement is merely a popular description of the nature and appearance of the house, but the real substance of that advertisement is contained in the direction to apply to the agent "who is in possession of the title-deeds." The other party, the purchaser, by not making inquiries, in point of fact replies that he takes them as they stand. Now, I should deem it a hardship to hold parties to a bargain on the technical terms of an advertisement or of an acceptance, being neither of them lawyers. It was needful in this case to look at the titles, and the first glance of an expert at them would have detected the error in the advertisement, for neither is the feu-duty nor the ground-annual £9; that sum represents neither burden. The state of matters revealed by the titles is that Sir John Maxwell of Pollock originally feued the whole plot of 6½ acres at £32, 19s. to James Connell, who created over 3½ acres thereof a ground-annual of £14, and under these two burdens, by various dispositions, an acre of the property came into Mr Nisbet's hands. It is clear that the subjects were in all liable for £32, 19s. and £14. Now it would be contrary to all reason to say the seller had misled the purchaser in a case like the present, where the purchaser was told to examine the titles, and *ex facie* the facts I have mentioned were patent. But even supposing that without going to look at the titles there had been a completed contract, all I think this mention of £9 in the advertisement meant was "I pay £9." I think that the seller really meant by this that he paid £5 feu-duty and £4 ground-annual in all. Can this mean that he guaranteed Mr Smith against any other payments? I do not think so. The true explanation of it all is that the seller paid £9 of "feu-duty" in the popular acceptation of that term, Now in that popular sense £9 was exactly what he did pay; that is clearly proved. Had it been shewn that he payed more, the position of matters would have been quite different. In conclusion, I may say that I am of opinion (1) that the titles were imported into the bargain; and (2) that on the common acceptance of the terms used £9 was the sum annually exigible from the seller. I am therefore for recalling the Lord Ordinary's interlocutor.

Lord Neaves—The views here adopted by the Lord Ordinary are, I think, too strict. The advertisement was put forth *in bona fide* by a man desirous of selling. Suppose in place of the expression used the £9 had been termed "ground-annual" and the purchaser had insisted on the seller's converting it into a feu, can it be supposed such an effort on the purchaser's part would have been attended with success? Supposing there to have been a completed contract, the meaning of the advertisement coupled with the reference to the titles is quite enough to protect the seller. The defender says the mention of the £9 was a statement as to the existing condition of the property, and had this statement turned out to be false or incorrect, I

can understand objections on the part of the buyer. But the statement clearly is a true one, and I think the attempt has entirely failed by which it was sought to make this statement not merely one of an obligation of £9, but a prospective obligation that the feu-duty should not exceed £9. If the defender has been led into all this by mere laxity in not examining the titles, we cannot allow the pursuer to suffer, all the more so as he was *in bona fide*, and showed that he was so by offering the titles for the purchaser's inspection. I cannot in any way think it possible for your Lordships to enforce the notice in this advertisement as a guarantee.

LORD ORMIDALE—I fear that this house will cost the defender a good deal more than it had done when he first entered on this transaction, but it is all his own fault, for he did not go, as suggested in the advertisement, and make the necessary inquiries from Mr Buchan as to the titles. To say the least of it, this was an imprudent mode of dealing. Both the pursuer and defender are non-professional men, and probably know little or nothing about titles and allocation or non-allocation of feu-duty. Perhaps the object was to save a little expense—if so, the defender has paid dearly for the economy. Looking at the contract so far as it was constituted, I think it may fairly be said that the advertisement will bear the meaning given to it, viz., that everything is under reference to the title-deeds. How, for instance, without such an inquiry, could the composition at entry be ascertained and many other essential points as to the feu? I concur with your Lordships in thinking the interlocutor reclaimed against should be recalled.

LORD GIFFORD—In this case I have had much doubt, and even now I concur with some feelings of difficulty. In the case of *Paton* v. *Steuart* there are certain differences, and those considerable. Had the feu-duty here been much understated, it would have rendered the seller's position a bad one. But Mr Smith here is to take the exact position of the seller, his predecessor. The whole feu-duty on 6½ acres is £32, 19s., or roughly, on one acre about £5. Again, the ground-annual on 3½ acres is £14, or on one acre £4. These two sums give the £9 named in the advertisement. Suppose that advertisement had said, "proportion of feu-duty and ground-annual effeiring to the house, and paid by me since I became proprietor, £9"—that would, I think, undoubtedly have been enough. If, then, every time that feu-duty has not been allocated the purchaser is entitled to call on the seller for his personal guarrntee in all time, it would never do. It is enough, I think, that the proportion be stated, as was here done.

The Court recalled the interlocutor of the Lord Ordinary, and decerned in terms of the first conclusion of the summons, with expenses.

Counsel for Pursuer (Reclaimer)—Balfour—Rhind. Agent—R. P. Stevenson, S.S.C.

Counsel for Defender (Respondent)—Asher—Alison. Agents—J. W. & J. Mackenzie, W.S.

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*Tuesday, June 6.*

## FIRST DIVISION.

[Sheriff of Edinburghshire.

## GALLACHER *v.* BALLANTINE.

*Diligence—Decree—Implement of Decree—Notice to Debtor—Bankruptcy (Scotland) Act* 1856, *sec.* 12.

A got decree against B for £8, 1s. 1d., of which payment was made upon a decree of furthcoming, after arresting in the hands of C, a creditor of B. Thereafter, B having been meantime made notour bankrupt, B, another creditor, got decree against A for £7, 15s., the proportion of the £8, 1s. 1d. due to him, comparing his debt against B with A's. A then proceeded to get further payment of his debt by executing a poinding of B's goods under the former decree. In a petition at B's instance for interdict against a sale of the poinded goods, on the ground (1) that the original decree had been implemented by the diligence of arrestment, and that the poinding was therefore wrongous; (2) that no notice of the poinding had been given to B; and (3) that under the statute, section 12, D had not been *in titulo* to recover from A.—*Held* (1) that the decree had not been implemented, and that A merely held as a trustee for other creditors; (2) that no notice was necessary; and (3) that the merits of the question between A and D could not be opened up.

This was an appeal from the Sheriff Court of Edinburghshire in a petition at the instance of John Gallacher, slater, West Calder, against L. H. Ballantine, draper there (respondent) praying for warrant to prohibit the respondent "from carrying away, selling, or disposing of, or interfering with" certain articles of furniture belonging to the pursuer, which had been poinded under the following circumstances:—

On 6th January 1875 Ballantine obtained a small-debt decree against Gallacher for £8, 1s. 1d.; and on 16th January he used arrestments upon that decree in the hands of a person named Taylor, a debtor to Gallacher, and having pursued a furthcoming, on 5th March he got decree. On 13th March Gallacher, having been incarcerated by Field & Allan, another creditor, was made notour bankrupt. Three days thereafter Taylor, the arrestee, paid Ballantine £8, 1s. 1d. under the decree of furthcoming. Upon 18th June Field & Allan, relying on the provisions of the 12th section of the Bankruptcy Act, took proceedings against Ballantine, for the purpose of compelling him to give them a share of the fund which he had recovered, proportioned to £114, 18s. 1d., the amount of their debt against Gallacher, the ground of this proceeding, which was also in the Small Debt Court, being the notour bankruptcy of Gallacher. The Sheriff decided in favour of Field & Allan, and against Ballantine, and on 30th June Ballantine was compelled on that decree to part substantially with the whole amount which he had recovered. In these circumstances Ballantine, having in the result obtained no more than 8s. 8d., proceeded to use further diligence and execute a poinding