during the subsistence of the marriage has not been disposed of in such a way as that the trustees are entitled to withhold it from the granter of the deed. I think the right to the income remained in Mrs Higginbotham as much after she had executed the deed as before. The result of holding aught else appears to me most startling, for then under no conceivable circumstances would any succession coming to Mrs Higginbotham be enjoyed by the spouses. They might be in poverty, and Mrs Higginbotham might succeed to a large sum of money, but the spouses could not benefit to the extent of one penny. They would be kept in poverty in order that there might be an accumulation for children who might never come into existence.

I think we should answer the questions in conformity with these views, by affirming the first and negativing the second.

Lord Mure—I am of the same opinion.

The clause which we have to construe is this conveyance to trustees, and we can only gather from the purposes expressed what the trustees are entitled to do with the money. Now, while there is a conveyance to the trustees of all the wife's property, there is no direction what to do with the income of the property so conveyed. There is evidently an omission, and we are asked what is to be done with this undisposed of income.

I agree with your Lordship that the radical right being in this lady, all that she did not expressly convey away remains in her. I think that is the sound principle as it was laid down in the cases of *Ramsay* and *Newlands*. The trustees have no power to accumulate the income, for they are not told to do so. I think it was the intention of the parties that the income should be available for the wife and her husband, and that after her death the direction to the trustees should come into operation.

Lord Shand—I quite agree with the argument that was submitted for the first and third parties, that in construing this deed one must look only to the terms of the deed. Taking that view, I think that according to the sound construction of the deed this lady has not settled her property so as to deprive her of the income during the subsistence of the marriage. It is true that for certain purposes she has conveyed away her property, and that from the date of the conveyance the title is in the trustees. But on the question for what purpose she has so conveyed it, it appears to me that the only purposes are that if the husband survives he is to have the liferent of one-half, and that if there are children they are to get the fee. There is so strong a presumption against the notion that one or both of the spouses are to be taken, by mere conveyance, to have divested themselves of the right to the income of their estate that I think nothing short of an express clause would be sufficient. In cases where a testator leaves his estate to trustees with a direction to convey the fee to beneficiaries, but postpones the period of payment until the beneficiaries reach the age of twenty-one or twenty-five, it has been held that the income is thereby disposed of. But the important element here is wanting in those cases, for of course the granter of a trust-disposition and settlement divests himself not only of all title to his property, but also of all interest. He could retain no right, for his life ceases before the deed comes into operation. When, however, as in this case, there is no direction as to the disposal of the income by the trustees, the granter from whom the right of property comes has the right to the income, and accordingly I think this lady is entitled to the income of the property so far as it came from her.

Lord Adam was absent.

The Court answered the first question in the affirmative, and the second in the negative.

Counsel for First and Third Parties—Low—Horn. Agent—F. J. Martin, W.S.

Counsel for Second Parties—Jameson—Martin. Agent—F. J. Martin, W.S.

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*Friday, June 25.*

## SECOND DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

## GEORGE & JAMES LYON *v.* ANDERSON.

*Lease—Tenant's Claim of Damages—Renunciation of Lease.*

The tenant of a market garden, after certain complaints of damage by flooding through the landlord's alleged fault, got into difficulties, and renounced the lease without making in the renunciation any reservation of a claim for damages. *Held* that he was barred from subsequently insisting in such a claim.

*Lease—Duty of Landlord—Drain.*

The landlord of a market garden provided a drain of sufficient capacity to carry the natural flow of water from adjoining lands belonging to him, also let, and on a higher level, through the garden. The garden was flooded through the drain on the higher lands becoming choked. *Held* that the duty of cleaning it belonged not to the landlord but to the tenant of the higher land, and that the landlord was therefore not responsible to the tenant of the garden.

On 27th September 1879 George & James Lyon, gardeners, agreed to lease from Mr James Anderson of Hilton, in Aberdeenshire, a piece of ground known as Westfield, on the possession of Hadagain. The ground taken was to be used as a market garden. Adjoining the lands of Westfield, and on higher ground was the farm of Smithfield, belonging also to the estate of Hilton. Through the lands of Smithfield ran a stream which had been formerly used to drive the threshing-mill at Smithfield. This stream was conducted along an open ditch, but at the end of the ditch was a pipe or covered waterway which conducted the stream under a road leading from the farmsteading of Smithfield. About a year before the Lyons' lease began Anderson had brought a new flow of water into the mill-dam from another farm belonging to him.

The Messrs Lyon entered upon occupancy in

Martinmas 1879. They occupied till 1884, in September of which year Anderson used sequestration for rent, and on 4th October they renounced the lease and removed from possession.

This was an action by Messrs Lyon for £40 damages for flooding of their land through the alleged fault of Anderson. The principal item in the damages claimed was on account of a large amount of potatoes said to have been destroyed in a flood in December 1882. They stated that the pipe or covered waterway already referred to was insufficient to convey the water which had to pass down it, that in winter 1881 to 1882, on 17th December 1882, and on 17th February 1883, much damage was done them by flooding. It appeared that on 19th December 1882 the Messrs Lyon wrote to Mr Anderson's Aberdeen agents a letter in which they said—"We are sorry to have again to acquaint you with the fact that our land has been a second time since our occupancy flooded by water from Mr Donald's dam, and the very essence of the soil, and in the channels cut the whole soil itself, swept away . . . We hereby therefore assert our claim for compensation, and expect it will be favourably received." On 19th February 1883 they wrote to Mr Anderson's agents stating that much of the finest soil had again been carried away by another flood, and that they held the landlord responsible for the damage.

The pursuers' allegations were denied by the defender, and it was averred that the defender agreed to accept the renunciation as at November 1884 on the distinct footing that all questions were thereby settled and departed from.

The letter of renunciation merely stated—"We . . . are to remove from the possession occupied by us as a market-garden at the term of Martinmas 1884."

The defender pleaded—"(2) Assuming that damage had been suffered, the defender is not responsible therefor. (4) The questions between the parties having been settled at the pursuers' removal, and the pursuers having failed to reserve this claim at the settlement, they cannot now prefer it."

The Sheriff-Substitute allowed a proof. The import of the evidence as to a claim for damages being made at the time of the renunciation is stated in his note.

The Sheriff-Substitute sustained the pursuers' fourth plea above quoted and found separately on the merits that pursuers had failed to prove their grounds of action, or that they had sustained damage through any cause for which defender was responsible.

"*Note.*— . . . . . I am unable to take the case out of the principle which the Court applied in *Broadwood* v. *Hunter*, Feb. 2, 1855, 17 D. 340; in *Baird* v. *Mount*, Nov. 19, 1874, 2 R. 101; and particularly in *Waterson* v. *Stewart*, Nov. 22, 1881, 9 R. 155—to the effect that the renunciation of their lease by the pursuers, even although it took the informal shape of a letter of removing, imported a discharge of all claims arising out of the missives of tack that were not expressly reserved. This suffices for the disposal of the case; and if it be a true ground of judgment, it is unfortunate that so much extraneous evidence has been collected."

The pursuers appealed to the Sheriff, who adhered.

"*Note.*—In 1879 the pursuers took from the defender a field of about ten acres, for the purpose of a market garden. It lies immediately below the farm of Smithfield, belonging to the same proprietor, and the cause of action is the damage which was done by flooding in the years 1881, 1882, and 1883.

"The ground of action which is averred is that the defender failed to provide sufficient pipes and channels for carrying the water past the farmsteading of Smithfield. I doubt the relevancy of any such claim at the instance of a tenant against his landlord; at the instance of a stranger it might be different, but the considerations which attach certain duties to the ownership of property in a question with a third party, or any member of the public, have no application where the land is let on lease, or is parcelled out amongst a number of tenants all holding under the same landlord. The proprietor's obligations are then fixed by his contract, and, *inter se*, the tenants are liable to each other for the consequences of their own negligence in the use and management of their respective possessions. When the pursuers inspected the ground before entering into their lease they could judge of its suitability for the object they had in view. They saw how the ditches and drains were arranged, and if in their opinion something ought to be done by the proprietor to lessen the liability to flooding they should have stipulated for it. But in the absence of any such stipulation I do not see how the obligation contended for results from common law.

"In the proof, however, which has been led, the point comes to be narrowed to this—there would have been no flooding on any of the occasions libelled if the volume of water could have forced its way through a covered drain which leads the ditch from the left to the right hand side of the road. The pursuers in their evidence attribute this to the drain being too small and in need of cleaning, but the other witnesses examined make it plain that the drain was large enough in point of size if the removal of the rubbish with which it was choked had been duly attended to. The flooding, in short, was caused by the negligence of the tenant of Smithfield in not periodically cleaning out the drain—at least primarily the duty was his, unless the landlord had expressly undertaken it. As I can find no evidence of this, I agree with the Sheriff-Substitute that the defender is in the circumstances not responsible. This renders it unnecessary to consider whether in the arrangements connected with the giving up of the field before the expiry of the lease it was intended to keep up the claim of damages, but I rather think the Sheriff-Substitute is right also in finding the point adversely to the pursuers."

The pursuers appealed to the Court of Session, and argued—When an agricultural lease came to an end the tenant had a right to claim from the landlord any damage that might have happened to the subjects through his fault or negligence. Although there was no express reservation of the tenant's claim for damages in the letter of removal, still George Lyon at that time had informed the defender's agent that he was going to make a claim, and that was sufficient, along with the letters previously quoted, to bring the case within the scope of *Broadwood* v. *Hunter*, Feb. 2 1855, 17 D. 340; *Hardie* v. *The Duke of*

*Hamilton*, Feb. 2, 1878, 15 Scot. Law Rep. 329; *Macdonald* v. *Johnstone*, June 12, 1883, 10 R. 959. The floodings and consequent damages were due to two causes—(1) To the drains not being sufficient in size to carry off the water; (2) because the landlord did not keep them clean. Even if the fault of not clearing out the drains was the fault of the tenant, in a question with third parties the landlord was the proper person to look to for redress. Here the damage did not arise out of breaking of the contract between the landlord and tenant, but by the fault of the landlord, and therefore he was liable.

The defender argued—This was not a case where the lease had gone on to its natural termination, but it had been renounced by the tenant and the renunciation accepted by the landlord, and therefore all claims by the tenant against the landlord were barred—*Waterson* v. *Stewart, &c.*, Nov. 22, 1881, 9 R. 155. There was a strong presumption that if it had not been so the landlord would not have accepted the renunciation. Was there here any fault on the part of the landlord; he provided pipes of sufficient capacity to carry off the water, and if the tenant allowed them to become choked up, that was the fault of the tenant and not of the landlord? It is the primary duty of the tenant to keep the drains clear. The landlord had no responsibility for the faulty acts of his tenant—*Tassie & Co.* v. *Magistrates of Glasgow*, June 18, 1822, 1 S. 503 (N.E. 467); *Weston* v. *Corporation of Tailors*, July 10, 1839, 1 D. 1218.

At advising—

Lord Justice Clerk—This case raises certain rather difficult questions. The position of the parties was this. The parties occupy the position of landlord and tenant, and the tenant says that on two occasions at least in 1882 and 1883, on the occasion of an unusual storm of rain, their property was flooded and injured by the soil being carried away. They gave notice to the landlord in 1882 and 1883 that they had a claim for damages against him. But their affairs seem to have got into confusion and they gave up their lease. A letter of renunciation was therefore prepared and was accepted by the landlord, the lease came to an end by the renunciation of it by the tenant, and that renunciation was accepted by the landlord.

Well, some little time after, some six months or so, they raise this action for damages, but they had said nothing about their claim at the time of the renunciation. The first question is, whether the renunciation of the lease was not equivalent to a withdrawal of the claim for damages? If in the letter of renunciation there had been anything in the nature of a reservation of their claim, the case would have been quite different, but in this case there is no such reservation. The tenant having fallen into difficulty applied to his landlord to relieve him, and the landlord accepts the renunciation, and relieves him of payment of future rent. But I cannot assume that the landlord would have accepted the renunciation if it had contained any reservation of a claim for damages. I think, on the authorities, the fact of the renunciation of the lease implies renunciation of all the rights arising out of it. In all the cases quoted to us there was always some communication made to the landlord at the time of giving up the lease as to the claim for damages, but here there was no communication. I have a strong impression that the landlord would not have accepted the renunciation if such a claim had been made.

But the second serious question is this—Is the landlord responsible for the damage done to the tenants' fields? It is certainly not proved that the drains which brought the water down from the farm of Smithfield were insufficient. They were sufficient to carry off the flood if they were kept in order, but they were not cleared out by the tenant of the superior farm. Is the landlord responsible for the negligence of his tenant? If the drains were handed over to the tenant in good order, had not the landlord discharged his duty? Should not the tenant keep the drain in proper order?

But, in the third place I have great doubt, with the Sheriff-Substitute, if any claim of damages has been proved at all. On these grounds, therefore, I am of opinion that we should affirm the Sheriff-Substitute's judgment.

Lord Rutherfurd Clark—I am also of opinion that we should affirm the Sheriff-Substitute's interlocutor. With respect to the proof of the damage said to have been caused, I think that it is insufficient. The main claim is one for potatoes said to have been destroyed by the storm of 1882. With respect to the damage, the claim was made in a letter to the landlord in 1882. But it is remarkable that when the tenant is claiming damage in that letter he speaks only of the loss of soil, and says nothing about his loss occasioned by the destruction of the potatoes. I am strongly of opinion that the loss must have been of an unappreciable character. There is nothing proved in the case that would enable us to assess the amount of damages. I am therefore disposed to put my judgment upon this ground, that the pursuer has not proved his case in point of fact.

But I think that there is another and satisfactory ground in which we may decide this case. I think if the tenant is to make good his claim against the landlord he must prove some fault on his part. But he has not established that the defender has committed any fault which caused the damage to the farm as arising from insufficient drains. But the insufficiency arose not from any want of capacity in the drains themselves, but from these drains not being properly cleaned out. But that is not the duty of the landlord but of the tenant.

Apart from that however, I am most disposed to put my judgment upon the ground that he has not proved any damage in point of fact.

Lord M'Laren—I concur in the view that the Sheriff-Substitute's interlocutor should be affirmed. The claim is one for damages caused by the flooding of the pursuers' field. The damage was said to be chiefly done in 1882, and the damage is asked for injury said to be done partly to the subject itself by the soil being washed away, and partly by injury done to potatoes which had been pitted in the field. The pursuer says that in the field there were two pits of potatoes, and that these were flooded and the

potatoes destroyed. In regard to the first head for which damage is claimed, it does appear that there was some intimation to the landlord, but I concur in the view that the pursuer has failed to establish any fault or negligence in the landlord which would be sufficient to found a claim of damages against him. The water came down to the lands of the lower tenant from the lands of the upper tenant, but it is part of the natural servitude of the lower tenant that he should receive the water from the lands of the upper tenement. No doubt the natural fall of the water is increased by means of drains, but if the drains are properly constructed it must be held that the flow of water through the lower tenant's land is part of the natural servitude on him. If the drains are proper for the purpose for which they are constructed, then apart from convention between the landlord and the tenant of the upper lands, the tenant is bound to keep these drains in proper order by cleaning them out. The Sheriff-Substitute is quite clear that the drains were not insufficient for their purpose, and that the flooding was caused by the drains being choked. If the fault of the landlord is to be the foundation of the case, then the pursuer must show that according to the agreement between the landlord and the tenant, the landlord undertook the duty of keeping the drains clear. That view is enough for the disposal of the case.

But I concur with your Lordship as to the effect of the renunciation of the lease. The renunciation is of the nature of a compromise. Seeing that the claim had been made upon the landlord, and that he had repudiated it, parties were at arm's length, and while the landlord is making the concession of giving up the lease I cannot presume that he would have done that without receiving an equivalent, but it is not necessary to give an absolute decision on this point.

The principal claim is for damages done to the potatoes. But when the tenant means to reserve his claim for damages he must give notice to the landlord, but no such notice was given here. It would be most inequitable that a claim should now be made upon the landlord when he has no means of finding out what is the actual state of affairs, which he might have been able to do if notice had been given at the time. I think that the conduct of the tenant has been inconsistent so far as regards his claim against the landlord. I am therefore of opinion that we should adhere to the Sheriff-Substitute's judgment.

Lord Young and Lord Craighill were absent.

The Court found that the "pursuers have failed to establish their claim for compensation or damage; therefore dismiss the appeal; affirm the judgment of the Sheriff."

Counsel for Pursuer — A. J. Young—Orr. Agents—W. Adam & Winchester, S.S.C.

Counsel for Defenders—Gillespie. Agent—John Macpherson, W.S.

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*Friday, June 25.*

## SECOND DIVISION.

[Lord Kinnear, Ordinary.

## THOM *v.* CHALMERS.

*Superior and Vassal—Feu-Duty—Retention—Irritancy* ob non solutum canonem.

A feu-contract stipulated that the vassal should build a house on the ground within a certain period, and also that if the feu-duty should be due and unpaid for two years consecutively the feu should revert to the superior. A house was built, and the feu-duty being more than two years in arrear the superior sought to enforce the irritancy. The vassal stated that he was retaining the feu-duty because the superior had refused, without any reason, to approve of his plans for a house he proposed to build, and for which that on the ground was intended as a lodge. *Held* that there was no good ground for withholding the feu-duty, and decree of irritancy *granted.*

By a feu-contract dated 1st June 1867 Robert George Crawford Cumming, Esq. of Barremman, disponed to in favour of Archibald Chalmers, coach-proprietor, Auchnear, Roseneath, certain lands one acre in extent lying upon the shores of the Gareloch. The feu-contract provided that for the first four years the feuar should pay £4 of yearly feu-duty, and after that that the feu-duty should be £10 per annum. It was provided that the feuar at the expiry of six years from the term of Whitsunday 1867, and within one year thereafter, should be bound to erect a dwelling-house and offices, the plans being shown to and approved of by the superior, and it should not be lawful to erect on the ground more than one dwelling-house and offices, and which dwelling-house and offices should compose the whole buildings to be erected, and be slated, and be in conformity to plans to be submitted to and approved by the superior, and be capable of yielding a certain yearly rent. It was also provided by the feu-contract that if at any time there should be two years' feu-duty in arrear and unpaid then the ground and buildings thereon should revert to the superior. In 1869 a small house called Woodside Villa was erected in one corner of the feu. No other house was ever built there.

In 1871 the estate of Barremman, including the superiority of the subjects feued to Chalmers, was sold to Robert Thom, Esq., the pursuer of the action, who was duly infeft.

This was an action by Mr Thom as superior to enforce the irritancy *ob non solutum canonem* incurred by non-payment of the feu-duty for more than two years consecutively. It was admitted that the feu-duty had not been paid since Martinmas 1877, but the defender, Chalmers, denied that the irritancy was incurred, on the ground that in 1879 he submitted plans to the superior for a dwelling-house he proposed to erect, but he, the superior, declined to approve of them, though he had never stated any reason for not approving, and the defender had in consequence been unable to erect a dwelling-house on the ground or to make it available for the purpose for which it was feued. He stated that it was in