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.

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

consequence of that that he declined to pay the feu-duty. The defender also stated that the small house he built in 1869 was not the house he was to build in implement of the obligation in the feu, alleging that it was only built as a lodge for the house he intended to build.

The pursuer pleaded, *inter alia*, that the defence was irrelevant.

The defender pleaded—"(1) The superior having wrongfully failed to sanction or approve of the plans of the dwelling-house and offices to be erected on the ground, and thereby prevented the defender from making the ground available for the purpose for which it was feued, he is not entitled to exact payment of the feu-duty stipulated in the feu-charter."

The Lord Ordinary allowed a proof. The defender led. He gave evidence to show that in 1869 he built a small house in the corner of the feu, the rental of which was £15, that he from time to time intimated his intention of building a mansion-house, and exhibited plans, but these were kept in pursuer's hands and were never approved of.

The Lord Ordinary decerned in terms of the conclusions of the summons.

"*Note.*—The defender has given no sufficient reason for refusing to pay the feu-duty. It is said that the feu has been rendered uprofitable by reason of the superior's wrongful refusal to sanction the erection of a dwelling-house on the feu; but the superior appears to me to be within his right in declining to waive the condition of the feu-contract, which prohibits the erection of more than one.

"It is said that the house which has been built is not of the character contemplated by the contract; and that a verbal agreement was made between the defender and the pursuer's author, who was then superior, that a larger house should be built, for which the present house should serve as a gardener's cottage. If this arrangement implied a departure from the terms of the feu-contract, it is in no way binding upon the pursuer. But I think it quite unnecessary to determine the extent of the superior's right to prevent farther building. Whether the house already built is or is not of the character originally contemplated in taking the feu, it has been built and accepted in satisfaction of the obligation to build. The time for the performance of that obligation is long past; and the superior makes no complaint that it has not been satisfactorily performed. On the other hand, there is no evidence that he has agreed to depart from his claim for feu-duty. The rights of parties therefore, are still to be measured by the feu-contract. If the contract allows the defender to build a new house, the superior cannot prevent him doing so. If it does not allow him to build a new house, he is still bound to pay the stipulated feu-duty, but all that the superior maintains is, that there are not to be two dwelling-houses on the feu. He does not pretend that he can prevent the vassal enlarging his present house, or building a new one, provided he does not violate the conditions of the feu-contract. I am not satisfied that the defender has hitherto had any serious intention of building. But if he has, the superior's refusal to sanction plans will not justify his refusal to pay feu-duty. It might have been better if the pursuer had stated distinctly whether he had any objection to the plan submitted to him irrespective of the stipulation as to the erection of more than one dwelling-house. But his refusal to commit himself further than by intimating that he was to insist in his rights under the contract does not appear to me to create any such obstacle in the way of the defender's making every legitmate use of his property, as to bar him from maintaining his claim for feu-duties.

"The defender will have an opportunity of purging the irritancy, if he thinks fit, before the decree becomes final."

The defender reclaimed, and argued—It was admitted that the defender had not fulfilled the conditions of the contract in erecting the necessary buildings upon the feu, but that was because the superior would not then consider plans laid before him. The simplest way that the tenant had of forcing his landlord to consider these plans, and so enable him to carry out his contract, was to withhold the payment of the feu-duty. The superior had taken no steps to enforce the obligation of the tenant to erect proper buildings at the proper time, and he had now no reason to refuse to look at the defender's plans. Bell (Prin. 702) laid down that a vassal had right to retain the feu-duties wherever any essential condition of the feu-right remained unperformed by the superior in his character as such—*Ainslie* v. *The Magistrates of Edinburgh*, Feb. 9, 1842, 4 D. 639; *Cockburn Ross* v. *The Governors of Heriot's Hospital*, July 1, 1825, 4 S. 128, and May 23, 1826, *rev.* H.L., 2 W. and S. 293; *Arnot's Trustees* v. *Forbes*, Nov. 3, 1881, 9 R. 89.

The pursuer's counsel was not called upon.

At advising—

Lord Justice-Clerk—In this case I am quite satisfied that the Lord Ordinary has come to a just conclusion and that his interlocutor is right, and that for the reasons which he has stated. It is quite clear that a vassal has no right to retain his feu-duty and not pay it to the superior because the vassal and the superior are at variance in regard to some matter incidental to the feu.

Lord Young—I am of the same opinion, and think that the reclaiming-note ought to be refused, but I think also that we should assent to the motion to delay the signing of our interlocutor for a fortnight in order that the defender may have an opportunity to purge the irritancy.

I only wish to say that in the course of his opinion I do not understand the Lord Ordinary to express any doubt—and I myself have certainly none—as regards the right of the vassal to erect any kind of a house he likes upon his feu. In the feu-charter there is inserted an obligation upon the vassal to erect a building upon his feu within a specified time; the length of time does not matter; in this case the limitation is that the building is to be erected within seven years. Well, the vassal is taken bound to build within that specified time, but if he does not build within that time, and the superior does not enforce the obligation, I do not think that that implies renunciation by the vassal of his right to build upon his feu at any time thereafter. That he has not built upon his feu does not imply any forfeiture of his right so to build. The vassal may build any kind of a house he likes upon this

feu; he may pull down one and put up another when he pleases, and will do nothing in contravention of the provisions of the feu-charter so long as he has only one house and offices at a time built upon the feu, to the building of which the superior cannot refuse his consent. Now, the vassal here says that he began by erecting upon a corner of his feu a small house, which might do for all the house he was going to erect, but was put in such a position that it might serve as one of the offices of a large house to be afterwards built. There may be some reason in that, but we cannot decide this question upon that footing. Upon this ground I am of opinion with your Lordship that the Lord Ordinary's judgment should be affirmed and the reclaiming-note dismissed.

Lord Craighill—I concur with your Lordships and in the interlocutor of the Lord Ordinary. I confess there does not appear to me to be any difficulty in the case. The action is brought to have it declared that the defender has incurred the irritancy of his feu and lost his right to the subjects *ob non solutum canonem* by reason of his failure to comply with the conditions of the feu-contract. Now, the alleged failure consists in the non-payment by the vassal to his superior of at least two years' feu-duty. The fact is that a good deal more than two years' feu-duty is in arrear. But that which is said in defence is, that the vassal had asked the superior to do certain things in regard to the erection of buildings upon the feu, but that he had refused to do so, and that therefore the vassal was entitled under the rule of law as laid down by Mr Bell to withhold the payment of the feu-duty until the superior duly performed his part. Well, if the vassal had been plainly right and the superior wrong on the face of the feu-contract there might perhaps have been something to say for the vassal's position. But there is a dispute between the two parties as to the proper construction of the feu-contract, and while this contention subsists between the parties I think that to affirm what is stated in defence would be to make the vassal judge in his own cause. I am therefore of opinion with your Lordships that the reclaiming-note should be refused.

Lord Rutherfurd Clark—I am of the same opinion. I think we may fairly postpone the signing of the interlocutor for a fortnight.

Lord Justice-Clerk—I would only wish to say that in regard to the point raised by Lord Young as to whether the vassal would be acting in contravention of the provisions of the feu-charter if he were to erect buildings upon his feu after the date at which he was taken bound by the charter to erect them, I understand that your Lordships have expressed no opinion upon that matter at all.

The Court, after giving the defender an opportunity of purging the irritancy, refused the reclaiming-note, and adhered to the interlocutor of the Lord Ordinary.

Counsel for Pursuer—Gloag—M'Clure. Agents—Cumming & Duff, S.S.C.

Counsel for Defender—Rhind—Baxter. Agent—William Officer, S.S.C.

Friday, June 25.

FIRST DIVISION.

SINCLAIR, PETITIONER.

Judicial Factor — Curator bonis — *Process—Petition for Recal.*

A petition for recal of an appointment of a *curator bonis* who had been appointed by the Junior Lord Ordinary *held* to be competently presented in the Inner House.

The Act 20 and 21 Vict. c. 56, section 4, enacts that "All summary petitions and applications to the Lords of Council and Session which are not incident to actions or causes actually depending at the time of presenting the same shall be brought before the Junior Lord Ordinary officiating in the Outer House, who shall deal therewith and dispose thereof as to him shall seem just, and in particular all petitions and applications falling under any of the descriptions following shall be so enrolled before, and dealt with and disposed of by, the Junior Lord Ordinary, and shall not be taken in the first instance before either of the two Divisions of the Court, viz.— . . . (4) Petitions and applications for the appointment of judicial factors, factors *loco tutoris* or *loco absentis*, or curators *bonis*, or by any such factors or curators for extraordinary or special powers, or for exoneration or discharge." . . .

This petition for recal of the appointment of *curator bonis* to a lunatic, who was stated in the petition to have recovered, and to be capable of managing his own affairs, was presented in the first instance in the Inner House. The curator had been appointed by the Junior Lord Ordinary on January 6, 1886.

On the petitioner craving order for intimation and service, the competency of presenting such an application in the first instance was doubted. It was argued by the petitioner that the Court of Session (Scotland) Act 1857 did not expressly authorise the Junior Lord Ordinary to deal with applications for recal as distinguished from applications for exoneration and discharge—*Simpson, Petitioner*, Jan. 11, 1860, 22 D. 350; *Lawson, Petitioner*, Dec. 19, 1863, 2 Macph. 355; and these unreported cases—*M'Innes*, Nov. 13, 1867; *Milne*, Nov. 13, 1867. The petition was therefore properly presented in the Inner House.

The Court ordered intimation, and thereafter on resuming consideration of the petition, no answers to which were lodged, recalled the appointment as craved.

Counsel for Petitioner—Guthrie. Agents—John C. Brodie & Sons, W.S.

Saturday, June 26.

FIRST DIVISION.

[Sheriff-Substitute of the Lothians.

M'GOVAN *v.* TANCRED, ARROL, & COMPANY.

Reparation — Master and Servant — Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *secs.* 4 *and* 7—*Delivery of Notice of Injury.*

Held that it was sufficient under sections 4 and 7 of the Employers Liability Act 1880