enforced, as was the schoolmaster's appointment in the case of *Morrison* v. *Abernethy School Board*, July 3, 1876, 3 R. 945. He was entitled, then, to reasonable notice of dismissal, which had been in point of fact fixed under the agreement as three months. The Act of 1882, which became law on 3d July, rendered the proceedings of 4th July null and void, in respect its provisions as regards notice of dismissal had not been complied with. The pursuer was, then, entitled to three months' notice of dismissal from 12th September, at which date alone the solemnities required by the Act were complied with, or pecuniary compensation equal to the value of his office for three months.

At advising—

Lord Young—The short question here (assuming the legality of the contract between the parties, which is not disputed) is, whether the notice given on the 4th July can be attached to the dismissal of, or the termination of the contract with, or the dispensation with the services of (whatever name may happen to be the proper one to be applied to it), the schoolmaster on the 12th of September? I am of opinion that it cannot. This really decides the case; and the Sheriff-Substitute taking that view, gave the pursuer from the 12th of September an amount of pecuniary compensation equal to the value of his office for three months from that date. The Sheriff altered the judgment on the ground that the Act of 1882, according to the provisions of which the dismissal (or whatever else it is called) of July was invalid, did not apply to the contract. Now, I cannot assent to this unless the contract was illegal. The Act applies to all legally appointed schoolmasters under School Boards, and therefore it applies to the appellant unless he was illegally appointed. Taking it as a contract of employment during pleasure, it falls to be enforced as the contract in the *Abernethy* case was enforced. There it was decided that reasonable notice was necessary, and that three months is reasonable notice here I assume, because I find that the parties have themselves fixed that term.

On the whole matter I am of opinion, and without any difficulty, that the judgment of the Sheriff-Substitute is right and should be reverted to.

Lord Craighill—I am of the same opinion, and if the School Board on the 4th July were entitled to dismiss the appellant, notwithstanding the Act of Parliament passed on the previous day, no doubt the dismissal then was good. But if, on the other hand, the passing of the Act paralysed the proceedings of the School Board because they failed to give the notice required by the Act, then the appellant was entitled to have notice of three months after such a notice as the Act required should be duly given. The after proceedings must be looked upon just as if the notice of July 4th had never been given.

I agree, then, in thinking that the appellant is entitled to the emoluments of his office for three months subsequent to 12th September, when he received a valid notice under the Act.

Lord Rutherfurd Clark—I am of the same opinion. After the *Abernethy* case I must hold that the agreement of 1880 is valid in all its terms. Under it the schoolmaster is not to be dismissed till after three months' notice of such dismissal—in other words, he is entitled to draw the emoluments of his office for three months after he has received valid notice of his dismissal. The Act of 1882 was passed, and regulated the manner in which notice is to be given. As the Act passed the day before the appellant was dismissed, and it is conceded he got no notice of dismissal as required by the Act, it follows that his dismissal was invalid.

I am of opinion, then, that the Sheriff-Substitute was right in giving him the emoluments of his office for three months after the valid resolution on the 12th September.

Lord Justice-Clerk—I concur. It seems clear enough that the proceedings taken for the dismissal of the appellant were invalid in consequence of the passing of the Act. The School Board then had to take fresh proceedings, and in doing so are bound to give the pursuer his emoluments for three months from the date of their valid proceedings.

The opinions of the Judges in the *Abernethy* case establish that there is no inconsistency between tenure of office at pleasure and one at reasonable notice, and that tenure at pleasure involves due notice.

The Court sustained the appeal, recalled the interlocutor of the Sheriff, and affirmed that of the Sheriff-Substitute.

Counsel for Appellant—Thorburn. Agent—John Rutherfurd, W.S.

Counsel for Respondents — Campbell Smith. Agent—R. Ainslie Brown, S.S.C.

Thursday, June 7.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

BUCHANAN AND ANOTHER *v.* MARR.

Property—Superior and Vassal—Feu-Contract—Building Restrictions—Self-Contained Villa.

A feuar was prohibited by his feu-contract from erecting or occupying on his feu "any buildings for any other purpose than dwelling-houses and relative offices," which buildings, it was further stipulated, should be self-contained, detached, or semi-detached villas," and should not be less than a certain size, nor exceed one on each quarter of an acre. He erected on his feu a detached dwelling-house of two storeys and a basement, with a separate entrance to each storey. The upper storey was entered by an outside stair. There was an inside stair giving communication between the basement and the ground floor, and the ground floor and top flat, so that the whole house could be used for one family. In an action at the instance of the superior and a co-feuar for declarator that the building was contrary to the terms of the feu-contract, and to have the vassal ordained to remove it—*held (diss.* Lord Rutherfurd Clark) that the building was not from its structure a contravention of the provisions of the feu-contract.

By disposition dated December 28, 1877, and duly recorded, James Marr disponed to James Davidson a plot or area of ground, part of the lands of Wellshot lying in the parish of Cambuslang. This piece of ground was part of a larger piece of ground feued out to Marr by Thomas Gray Buchanan of Scotstoun. Marr retained the remainder of the ground so feued to him. At the time of this action Michael Rowand Gray Buchanan of Wellshot and Rosebank, the successor of T. G. Buchanan above mentioned, was superior of both Marr and Davidson.

By the feu-contract (which was dated 16th and recorded 20th February 1875) between Buchanan and Marr, the feuar was prohibited from exercising or carrying on any one of a variety of trades or processes on the ground feued, and he was also forbidden "to erect on said plot of ground or any part thereof, or occupy thereon, any buildings for any other purposes than dwelling-houses and relative offices, which dwelling-houses shall be self-contained, detached, or semi-detached villas, shall face toward" a certain and specified road, "and shall not be of smaller size than three rooms and kitchen, and shall not exceed in number one for each separate quarter of an acre."

The present action was raised against Marr at the instance of Buchanan as superior of the lands, and of Davidson as co-feuar with Marr, for declarator that the defender was not entitled to erect on his feu any buildings to be used for any purpose than dwelling-houses and relative offices, and not entitled to erect any dwelling-house other than self-contained, detached, or semi-detached villas, not of smaller size than three rooms and kitchen, and not to exceed in number one for each quarter of an acre, and that a building which the defender was erecting, and which he afterwards completed, was "not a self-contained, detached, or semi-detached villa facing towards the said road, but, on the contrary, that the said building or buildings was intended for and about to be completed as two separate dwelling-houses in flats, and that the portion of ground upon which the same is built is not one quarter of an acre for each separate dwelling-house, and further that the erection of the said building or buildings is a contravention of the said feu-contract, and to the prejudice of the pursuers." The pursuers also concluded for interdict against the defender proceeding with and completing the building complained of, and that he should be decerned to take down and remove it and the materials.

The building complained of was described by the Lord Ordinary in his note as being when completed "a detached dwelling-house of two storeys, with a separate entrance to each, and a basement storey, having also, as is not unusual, a separate door of entrance. There is a communication by means of an internal stair between the basement and the ground floor, and between the ground floor and the upper floor, so that the whole building may be occupied as a single dwelling-house by one family. But the communication between the two upper floors may be readily cut off, and if that was done the internal arrangements are such that each might be conveniently occupied as a separate house."

From the proof it appeared that after remonstrances had been made by the agents of the pursuers, and while a correspondence was in progress in which this action was threatened, the defender had made the communication, by means of an internal stair between the basement and ground floor, and between the ground floor and the upper floor, which was mentioned by the Lord Ordinary.

The pursuers pleaded — The building complained of being disconform to the conditions of the feu-contract, the defender is not entitled to erect the same.

The defender, besides averring and founding on such alleged acquiescence of the superior as would bar the action at his instance, pleaded—"(1) Neither of the pursuers separately has sufficient title and interest to sue the present action, or to object to the building complained of, and the pursuers conjointly have no such title and interest. (2) The pursuers' statements are irrelevant. (3) The building complained of not being in contravention of the defender's rights under the said feu-contract, the defender should be assoilzied."

The Lord Ordinary (KINNEAR) assoilzied the defender from the conclusions of the libel.

"*Opinion.*—[*After detailing the prohibitions in the feu-contract, and the conclusions of the action*] —The complaint therefore is, that the erection of the building in question, considered structurally, and apart from any use which may be made of it, is a contravention of the feu-contract; and the only remedy asked is a decree for taking down and removing the building, and the whole materials of which it is formed, from the ground.

[*His Lordship then described the nature of the building complained of as quoted above.*]—"The erection of such a house does not appear to me to be in itself a contravention of the feu-contract. It is a detached villa or dwelling-house. The portion of ground upon which it stands is more than a quarter of an acre in extent; and it is established by the pursuers' evidence that the existence of a separate door of access to the upper storey does not in itself prevent its being considered a self-contained house. For the superior's architect who was examined as a witness for the pursuers depones in his examination-in-chief—'I would describe the house as it at present stands as a self-contained house with a stair inside,' although he thinks 'the outside stair an excrescence which should not be there at all.'

"But it is said that the two floors were from the first, and are still intended to be, occupied as separate dwelling-houses, and that the internal communication, which is shown to have been an afterthought, is a mere device for evading the restrictions of the feu-contract. There can be no doubt that as the house was originally constructed no such communication was contemplated; and the defender admits that he now intends to use it in the same way as certain other houses on the estate, 'the upper floor being let as a separate house complete in itself.' But these considerations are not, in my opinion, sufficient to support the action. If the defender's house is in its structure of such a character as to satisfy the conditions of the feu-contract, I think it very doubtful whether the contract contains any effectual restriction against its being occupied by several families, or otherwise than as self-contained houses. The feuars are prohibited from

occupying any buildings otherwise than as dwelling-houses and relative offices. But the condition that the houses shall be self-contained occurs in a part of the clause of restriction dealing, not with use or occupation, but with the structural character of the houses to be erected. The clause is not identical with that which occurred in *Fraser* v. *Downie*, 22d June 1877, 4 R. 945, and which was construed by Lord Shand in the sense I have indicated. But it is very similar to that clause, both in its terms and in its relation to the context; and if it were necessary or proper to determine in this action whether the defender is entitled to use it in the manner proposed, I should consider Lord Shand's observations as having a very material bearing upon that question. But this is not an action for regulating uses or methods of occupation. The only question raised, or which can be determined, is whether the defender's house from its structural character is a contravention of the contract, so as to entitle the pursuers to have it taken down. I think it is not such a contravention, and that the pursuers are not entitled to have it taken down.

"It is unnecessary to consider the question which was argued, whether the pursuer Mr Davidson, as a co-feuar with the defender, has a title to sue, because the superior is also a pursuer, and his title to sue upon his own contract is beyond question. It was argued that the superior has no title to prevail, inasmuch as he has no interest to enforce the restriction as to building. But in the view I have taken of the case the question of his interest does not arise."

The pursuers reclaimed, and argued that the restriction against erecting a building of other than a certain class had been contravened; a restriction on the use of a building after it is completed might be enforced—*Ewing* v. *Campbells*, November 23, 1877, 5 R. 230; *Ewing, &c.* v. *Hastie*, January 12, 1878, 5 R. 439.

The defender in reply relied on the case of *Moir's Trustees* v. *M'Ewan*, July 15, 1881, 7 R. 1141.

At advising—

Lord Young—I am of opinion that the judgment is right here, and that much on the grounds taken by the Lord Ordinary, in all of which I concur. We have here no question properly and legitimately raised as to the use of the building in question. The declaratory conclusion of the summons is to the effect, that as a structural building it is a violation of the conditions of the title of the vassal who has built it, and the operative conclusion is to the effect that the defender should be ordained to take it down and remove it, and the whole materials of which it is formed, off and from the ground.

Now, it appears that whereas under the feu-contract it is provided that only villas, self-contained, detached, or semi-detached, shall be allowed to be erected, it is said that this building has a front door below and a back door above, with an outer stair leading up to it, and that the upper floor is so constructed that it may be conveniently used by one family, the lower floor being also capable of similar use by another family, and that in point of fact the defender intends so to use the building.

I have already observed that the action is not directed against the use of the building, but against the building as a material structure attempted to be raised in violation of the conditions of the feu-contract; the matters objected to being that there is accommodation for two households—two pantries, closets, and kitchens, etc., instead of one. Now, I cannot listen to such objections to structure here made by the superior or anyone else. Such objections are in my opinion ridiculous. Whether the superior could complain of the use made of the house by two families instead of one (and there might be a single lady living on each floor) as a use inconsistent with its being a "self-contained" house, I with the Lord Ordinary decline to inquire, because this is an application for the removal of a building, and is not directed against the use made of it. So far as I can see, such an application would not be any more successful than the present, but certainly the question is not raised here. On the whole matter I am prepared to affirm the judgment as it stands, and on the grounds stated.

Lord Craighill—I also concur with the Lord Ordinary. The feu-contract contains restrictions which must be read in their fair meaning. If the pursuers have shown that the feu-contract has been broken as regards these, then they are entitled to redress. The restriction sought to be enforced here is to the effect that the buildings are to be villas, detached or semi-detached, and self-contained. The pursuers aver that the villa erected is not self-contained. The question is, have they discharged the *onus* which rests on them of proving this? I am of opinion they have not. No doubt it may be said that the building is capable of being used for one or two houses, but on the evidence it appears that this building is suitable for a self-contained dwelling-house, and it is impossible to say it is not of such a character in the sense of the feu-contract.

Lord Rutherfurd Clark—I am sorry I cannot concur in the judgment now to be pronounced. The purpose of the action is to enforce a clause in the feu-contract libelled, and I understand all your Lordships are at one in assuming that the superior and concurring vassal are entitled to enforce the clause against the defender. The question then is, whether or not the pursuers are well-founded in saying that the house which was in course of being built by the defender when the summons was brought is a contravention of the clause or not?

Now, that contract makes this provision amongst many others—The feuar is not to occupy the plot with any building except a dwelling-house, so that nothing is to stand on the plot except a dwelling-house. Then comes a provision which I take it is intended to secure the character of the dwelling-house to be erected by the vassal, and which is thus described, "which dwelling-houses shall be self-contained, detached, or semi-detached villas." There is a further provision in the feu-contract connected with the general feuing plan of the ground, that each quarter acre shall only have one house, and we are here dealing with the quarter of an acre in the defender's possession as vassal; so that the result of the clauses as to him is that he is to have no building on it except a dwelling-house, and only one dwelling-house, and that to be a self-contained villa. These are

the three conditions which may be enforced against the vassal, and the question is, has he violated them?

Now, it may not be altogether easy to define the word "self-contained," because we know that definitions are both difficult to form and are easily criticised when formed; but I must say the question which I should put to myself would be, whether, assuming the house to be constructed as the defender proposed at first, that house would have been one or two houses? In my opinion, beyond doubt two houses and not one would have been in the ordinary sense erected according to the meaning of the contract. He intended one tenement, but one dwelling-house with a separate entrance, and also another on the upper storey with its separate entrance, and these two were separated as usual by a horizontal line of separation or division.

Now, I cannot look at it except as a building consisting of two dwelling-houses, and therefore as a breach of the conditions of the feu-contract. I decline to give a definition of a "self-contained" house, but when I find a house to be occupied separately below and separately occupied above, I cannot hold it a "self-contained" house, but necessarily two houses. Now, it is said that the defender has finished off the house in a manner different from what he originally contemplated, in that he made a communication by which access can be got from the lower to the upper storey. Now, that is but a transparent device to avoid the conditions of the feu-contract, and I have little doubt if your Lordships assoilzie the defender that the internal communication will disappear and the houses will then become entirely separate houses. I think the pursuer is entitled to challenge such a violation of the feu-contract. I am not dealing with the use, but entirely with the question what are the kind of buildings the feuar is allowed to erect on the feu in terms of his feu-contract, and I am of opinion that he has erected one which is not fitted to the conditions of that contract.

Lord Justice-Clerk—I so entirely agree with the Lord Ordinary that I do not think it necessary to say more; but as Lord Rutherfurd Clark has dissented so strongly from the views adopted by the majority of the Court, I shall endeavour to express my views in a sentence or two.

The conditions of the feu-contract were that the feuar should build on the ground one dwelling-house, and that self-contained and detached or semi-detached. I think that one dwelling-house means one tenement intended for a dwelling-house, and the word "self contained" is no more incapable of definition than "detached" or "semi-detached."

I take it a "self-contained" house is, popularly speaking, a house adapted for the residence of a single family, and not necessarily a house which can be turned to no other use. The question of use or occupation is apart from that, but here the question is, whether the structure as it existed prior to this action was a structure incapable of being used by a single family? I cannot see why, and we heard nothing from the bar to lead us to such a conclusion. The outer stair may be used for the occupation of the family above, and therefore that part of the case resolves itself into one of occupation and not of structure, and as to the double set of rooms, they may be useful, and the proprietor may shut off as he chooses one-half of the family from the rest. Now, I must say the conclusions of this action are startlingly extreme, for it is not demanded of the feuar to take away the outer stair, &c., but to remove the whole structure from the ground, and there are no other petitory conclusions at all.

On the whole matter I am of opinion that there is nothing here inconsistent with the feu-charter. I am therefore for adhering.

The Court adhered.

Counsel for Reclaimer—Mackintosh—Dickson. Agents—Smith & Mason, S.S.C.

Counsel for Respondents—J. P. B. Robertson—W. C. Smith. Agent—W. S. Harris, L.A.

Friday, June 8.

FIRST DIVISION.

[Lord Fraser, Ordinary.

M'LARENS *v.* SHORE.

Process—Reclaiming-Note—Reclaiming Days—Court of Session (Scotland) Act 1850 (13 *and* 14 *Vict. c.* 36), *sec.* 11—6 *Geo.* IV., *c.* 120—*Interlocutor Disposing of Merits of Cause.*

An interlocutor was pronounced in an action decerning against the defender with expenses. The defender then lodged a minute of reference to the oath of the pursuers. *Held* that an interlocutor refusing to sustain the minute of reference was an interlocutor disposing of the merits of the cause, and could therefore be reclaimed against within twenty-one days.

Observed (per Lord Shand) that if the interlocutor had sustained the minute of reference it would have been an interlocutor determining a matter of procedure, and a reclaiming-note against it must have been presented within ten days.

The Judicature Act (6 Geo. IV. c. 120) enacted that any interlocutor of a Lord Ordinary might be reclaimed against within twenty-one days.

The Act 11 and 12 Vict. c. 36, sec. 11, provides —"And be it enacted that it shall not be competent to reclaim against any interlocutor of the Lord Ordinary at any time after the expiration of ten days from the date of signing such interlocutor, with the exception only of reclaiming-notes against interlocutors disposing in whole or in part of the merits of the cause, and against decrees in absence, which reclaiming-notes shall continue to be competent in like manner as at the passing of this Act."

This was an action at the instance of Messrs T. & W. A. M'Laren, W.S., against John Shore, sole partner of John Shore & Company, builders, Grindlay Street, Edinburgh, to recover £151, 13s. 5d. alleged to be due in respect of business charges and disbursements.

On 15th July 1882 a remit was made to the Auditor of the Court of Session as judicial referee, and after his remit was lodged on 12th May 1883 the Lord Ordinary (Fraser) pronounced this