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

interlocutor— . . . "Approves of said report, interpones authority thereto, and in terms thereof ordains the defender to make payment to the pursuers of the sum of £146, 19s. 4d., with interest thereon at the rate of five per cent. per annum from the 3d day of June 1882, being the date of citation: Ordains the defender further to make payment to the pursuers of the sum of £48, 15s. 2d. of expenses of process, and of the judicial reference, and decerns: Finds the defender liable to the pursuers in the sum of two guineas of modified expenses occasioned by this discussion, and decerns against him therefor accordingly."

The defender then put in a minute of reference to the pursuers' oath, and on 23d May 1883 the Lord Ordinary (Fraser) pronounced this interlocutor—"The Lord Ordinary having heard counsel, Refuses to sustain the minute of reference by the defender to the oath of the pursuer: Finds the defender liable to the pursuers in the sum of two guineas of modified expenses occasioned by this discussion, and decerns therefor against the defender accordingly."

On 5th June the defender lodged a reclaiming-note, to the competency of which the pursuers objected on the ground that it was too late.

Argued for them—The interlocutor of 23d May 1883 was not one disposing in whole or in part of the merits of the cause, and therefore could only be reclaimed against within ten days, as it did not fall within either of the exceptions in section 11 of the Act of 1850—*Cowper* v. *Callender*, January 19, 1872, 10 Macph. 353; *Fraser* v. *Fraser*, January 30, 1872, 10 Macph. 420; *Walker* v. *Flint*, January 23, 1863, 1 Macph. 303.

Defender's authorities — Cases in Mackay's Practice, i. 558; *Kirk-Session of Wester Anstruther* v. *Wilkie*, May 13, 1868, 5 Scot. Law Rep. 495.

At advising—

Lord President—The objection against this reclaiming-note is now rested on section 11 of the Court of Session (Scotland) Act 1850 (13 and 14 Vict. c. 36), which 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," *i.e.*, shall be competent within twenty-one days.

This enactment can admit of no double construction, and has been more than once strictly applied by the Court, and the only question is whether the interlocutor under review disposes in whole or in part of the whole cause.

The state of the process is as follows:—On 12th May 1883 the Lord Ordinary pronounced this interlocutor, which disposed of the whole merits of the cause, . . . "Ordains the defender to make payment to the pursuers of the sum of £146, 19s. 4d., with interest thereon at the rate of five per cent. per annum from the 3d day of June 1882, being the date of citation: Ordains the defender further to make payment to the pursuers of the sum of £48, 15s. 2d. of expenses of process, and of the judicial reference, and decerns: Finds the defender liable to the pursuers in the sum of two guineas of modified expenses occasioned by this discussion, and decerns against him therefor accordingly." Now, it is almost impossible to conceive an interlocutor which would more completely dispose of the whole merits of the cause, for it not only decerns against the defenders on the merits, but also decerns against him for expenses, and left nothing more to be done.

But then after final judgment in a cause either party has the right to refer the question in dispute to the oath of his opponent, and in ordinary circumstances this right cannot be interfered with, though in certain cases such reference is incompetent, and in others still the Court will disallow it. Therefore there is always a question whether such a reference is to be sustained or refused; but when the party puts in his minute of reference to oath, he in a certain sense revives the case, and if he is found entitled to have the reference sustained, then the merits are disposed of on the import of the oath, and the interlocutor which disposes of that will be a final judgment.

Here the Lord Ordinary has refused to sustain a reference to oath, and accordingly if his interlocutor is right no oath will be taken, and there will be no judgment on the import of it. Still the question is, whether the interlocutor refusing to sustain the reference to oath is not a judgment on the merits of the case as much as an interlocutor before any trial or inquiry at all dismissing the action on the ground of incompetency or irrelevancy. In one sense such an interlocutor is a refusal to enter on the merits of the cause, but it is still a judgment on the merits, for it turns the party out of Court; so here also the judgment turns the party out of Court without allowing him to try the cause over again on a reference to his opponent's oath.

I think therefore that this judgment is within the exception contained in the 11th section of the statute, and that this reclaiming-note is competent. Of course we cannot at this stage consider whether the party is entitled to make this reference to oath, for that will fall to be decided when the case is sent to the roll.

Lords Deas and Mure concurred.

Lord Shand—I agree with your Lordship. This interlocutor is one which deals with the merits of the cause. A reference to oath when competent raises a question on the merits even after a decision, that question being what is the effect of the oath, the result of which may either be decree as concluded for or absolvitor.

If the interlocutor had been one sustaining the minute of reference I should then have held it to be an interlocutor which must be reclaimed against within ten days, for the Lord Ordinary would merely have thereby determined a matter of procedure, and until the cause had been dealt with on the reference there would have been no judgment on the merits. This appears to be a judgment on the merits just as much as an interlocutor dismissing the action as incompetent.

The Court repelled the objections to the competency of the reclaiming-note and sent the case to the roll.

Counsel for Pursuers (Respondents)—Brand. Agents—T. & W. A. M'Laren, W.S.

Counsel for Defender (Reclaimer) — Shaw. Agents—Paterson, Cameron, & Co., S.S.C.