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

to prove that the employer *de facto* received a post letter from the workman within six weeks from the date of the accident, setting forth the necessary particulars, and that it was not essential that the notice should have been delivered by hand, or sent through the post by registered letter.

This was an action of damages for personal injuries in the Sheriff Court at Edinburgh, at the instance of James M'Govan against his employers Tancred, Arrol, & Company. The action was brought at common law, and also under the Employers Liability Act 1880.

The question raised was, whether the pursuer had given the defenders sufficient notice under the Act. Section 4 provides that "an action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident." Section 7 directs what shall be set forth in the notice, about which there was in the present case no question, and then enacts that the notice "shall be served on the employer, or if there is more than one employer, upon one of such employers. The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served. The notice may also be served by post by a registered letter, addressed to the person on whom it is to be served at his last-known place of residence or place of business."

The accident in question happened on 15th September 1885.

On 20th October 1885 the pursuer wrote a letter to Mr W. G. Wieland, secretary Forth Bridge Railway Company, which gave notice of the accident in accordance with the statutory requirements.

On 21st October Mr Wieland wrote to the pursuer as follows:—"I am in receipt of your letter of the 20th instant, which, however, should have been addressed to the Forth Bridge contractors, as this company have nothing whatever to do with the matter. I have forwarded your letter to the contractors."

On 29th October the pursuer wrote to Messrs Tancred, Arrol, & Company as follows:—"More than a week ago I addressed a note to Mr Wieland, secretary Forth Bridge Company, because I did not know but that that was the right thing for me to do. In that note I stated that I had sustained a severe accident whilst at work on the morning of the 15th November in No. 2 shed at your works. I also called attention to the fact that it was well known that the accident arose from no fault or negligence of my own, but was due to defects in gear, &c. In reply, Mr Wieland, after saying that I should not have sent to him on this matter, intimated that he had sent the note to you. As, however, no further reply has reached me, I am anxious to know whether you have got it, and if so whether you think of making any reply to it at all. Leaving the matter to your own consideration in the meantime, and waiting any answer you may feel inclined to make," &c.

Messrs Tancred, Arrol, & Company wrote on the same date to the pursuer—"On receipt of your letter addressed to Mr Wieland, we forwarded it to The Boiler Insurance and Steam Power Company, 67 King Street, Manchester, who take charge of these matters for us, and to whom we are to-day sending your second letter."

The defenders pleaded—"(1) The statements of the pursuer are not relevant, and are insufficient to support the conclusions of the action. (2) Notice that injury had been sustained not having been given by the pursuer in terms of the Employers Liability Act, the action is not maintainable under that statute, and should be dismissed *quoad* that Act."

The Sheriff-Substitute (RUTHERFURD) on 14th May 1885 repelled these two pleas, and allowed the pursuer a proof.

The defender appealed to the Court of Session, and argued, upon the second plea, that the notice was insufficient, because there had not been service either by delivery or by registered letter—*Keen* v. *Millwall Dock Co.*, 8 Q.B.D. 482.

The pursuer replied that this was a remedial statute which should not be construed hypercritically—*Thomson* v. *Robertson & Co.*, November 14, 1884, 12 R. 121. Delivery meant delivery in any way, and, besides, the defenders had accepted as due notice the letter forwarded to them.

At advising—

LORD PRESIDENT—It is quite indispensable under the statute that the notice of action should be served within six weeks from the date of the accident, and if that is not done then the action cannot be maintained. All that is quite plain.

But what is the requisite manner of serving the notice, and what is sufficient service? Now, there are two modes of service; one is "by delivering the same to or at the residence or place of business of the person on whom it is to be served." That is plainly a notice by delivered letter as distinguished from a post letter, and that was not the mode of service in the present case. Then there is the alternative mode—"The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business." That is to say, the pursuer may avail himself of the post as a means of giving notice, and that by registered letter; and the reason of this is, that he is not to be entitled to avail himself of the presumption applicable to ordinary correspondence, that a letter has reached its destination unless returned through the dead-letter office.

But if in addition to posting the letter he has also registered it, then that creates a presumption that the letter was delivered. For it is provided that "in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered." It is to be sufficient to prove that the letter was properly addressed and registered; but that is not to preclude the defender from proving that the letter never reached him, and I think that the pursuer is as little precluded, though the letter was not registered, from proving that the letter was actually received.

That fact is proved here by the letter which the defenders wrote on 29th October 1885 to the pursuer. On that date the pursuer had written to the defenders, and his letter winds up thus—"In reply, Mr Wieland, after saying that I should not have sent to him on this matter, intimated

that he had sent the note to you. As, however, no further reply has reached me, I am anxious to know whether you have got it, and if so, whether you think of making any reply to it at all."

The defenders' answer to this is dated the same day, and is in these terms—"On receipt of your letter addressed to Mr Wieland, we forwarded it to the Boiler Insurance & Steam Power Co., 67 King Street, Manchester, who take charge of these matters for us, & to whom we are to-day sending your second letter." That is to say, there is under the hand of the defenders a distinct acknowledgment that the letter forwarded by Mr Wieland had been received by the defenders.

I think that there was here sufficient notice, for the pursuer's letter was *de facto* received by the defenders within the time limited by section 4 of the statute.

LORD MURE—I have no difficulty about this case.

It is plain that the letter written by the pursuer to Mr Wieland reached the Forth Bridge Railway Company, and when they get it they deal with it as a notice which they have received, and send it on to their agent in Manchester.

I do not think it is necessary to say anything about the meaning of the term delivery used in the statute, but it does not seem to me that a letter can be said not to be "delivered" because it is sent and delivered through the post. I agree, however, that the letter would require to be registered in order to raise the presumption that it had been delivered.

LORD ADAM—The defenders' argument is this, that if the pursuer was to avail himself of the post, he could only do so by means of a registered letter. I do not think, however, that the statute prescribes that as a solemnity, for it only says that the notice "may be" served by post by a registered letter. If it is served by post by a registered letter, then that throws the *onus* of proving that he never got notice upon the defender. But here there can be no question that the defenders got notice, for there is evidence of that fact under their own hand.

LORD SHAND was absent.

The Court repelled the first and second pleas for the defenders, and ordered issues.

Counsel for Pursuer and Respondent—Rhind—Gunn. Agent—Robert Stewart, S.S.C.

Counsel for Defenders and Appellants—Comrie Thomson—Hay. Agents—Reid & Guild, W.S.

Saturday, June 26.

FIRST DIVISION.

[Sheriff of Lanarkshire, at Airdrie.

STRAIN *v.* STRAIN JUNIOR.

(*Ante*, p. 90).

Sheriff—Appeal—Competency—Civil Imprisonment (Scotland) Act 1882 (45 *and* 46 *Vict. cap.* 42), *sec.* 4.

Held that an appeal against a deliverance of a Sheriff-Substitute refusing to grant a warrant under section 4 of the Civil Imprisonment (Scotland) Act 1882 is incompetent.

In an action of separation and aliment at the instance of Mrs Mary Thomson or Strain, residing (at the date of this process) at 7 Ornatus Terrace, Wyndham Road, Rothesay, against her husband, Hugh Strain junior, coalmaster, residing at Merrybank Cottage, Nettlehole, Airdrie, the Court of Session on 2d November 1885 pronounced decree of separation, and decerned the defender to make payment to the pursuer of the sum of £52 yearly of aliment, commencing as at 15th December 1884, with expenses.

On 16th December the defender was charged to make payment of aliment then due, with interest and expenses. The defender failed to make payment.

This petition was presented by the pursuer in the Sheriff Court of Lanarkshire at Airdrie, under the provisions of the Civil Imprisonment (Scotland) Act 1882, for warrant to cite the defender to appear and show cause why he had failed to pay to the pursuer the sums of aliment with interest and expenses therein specified, "and in the event of the defender failing to appear at such diet as the Court shall appoint, or to prove that his failure to pay said sums was not wilful, to grant warrant to officers of Court to apprehend the defender and commit him to the prison of Glasgow, therein to be detained for such period, not exceeding six weeks, as the Court shall appoint, or till he pay the sums aforesaid to the pursuer, or such instalment or instalments thereof as the Court may appoint, or till the pursuer is otherwise satisfied."

The Sheriff-Substitute (MAIR) on 18th June 1886 pronounced this deliverance:—"Finds it proved to the satisfaction of the Sheriff-Substitute that the respondent Hugh Strain junior has not, since the commencement of the action in which the decree referred to in the petition was pronounced, possessed or been able to earn the means of paying the sums of aliment and expenses contained in the charge on the said decree, and that he has not wilfully failed to pay the same; therefore dismisses the petition."

The pursuer appealed to the Court of Session.

On the case appearing in the Single Bills the respondent objected to the competency of the appeal, on the ground that the matter was left entirely to the discretion of the Sheriff or Sheriff-Substitute—*Tevendale* v. *Duncan*, March 20, 1883, 10 R. 852.

Argued for the appellant—The Sheriff-Substitute had here pronounced a judgment, and that was appealable to the Court of Session, unless