allowed, that ought to have been argued to the Court. If it had been, I am not sure that we could have given effect to the argument.

LORD KINNEAR—I agree that the question raised is not a question of taxation, but is a question for the Court to decide, and that it cannot be brought competently before the Court after the question of expenses has been finally disposed of by interlocutor.

The LORD PRESIDENT concurred.

Counsel for the Pursuer—Clyde. Agents—Dove & Lockhart, S.S.C.

Counsel for the Defender—Salvesen. Agents—E. A. & F. Hunter & Company, W.S.

Tuesday, May 22.

FIRST DIVISION.

[Sheriff of Kirkcudbright.

JOHNSTONE v. HUGHANS.

Landlord and Tenant—Lease—Obligation to Renew Buildings.

In the lease of a farm for nineteen years the landlord undertook to execute certain repairs and improvements upon the farm buildings, and the tenant undertook to maintain the buildings in good and sufficient repair. *Held* that the obligation in the lease only imposed upon the tenant the duty of making ordinary repairs, and that the landlord was bound to restore buildings which required to be renewed during the currency of the lease.

Landlord and Tenant—Damages—Claim by Tenant for Landlord's Failure to Put Buildings in Tenantable Condition—Mora—Whether Tenant Barred by Payment of Rent without Deduction or Reservation.

In 1894 a tenant who had entered upon a farm in 1881 under a lease for nineteen years, brought an action against his landlord for damage which he alleged he had sustained since 1888, owing to the landlord's failure to renew certain of the farm buildings which had become dilapidated. The pursuer averred that at the half-yearly rent collection in the summer of 1887, and again at every succeeding rent collection, as well as on other occasions, he had intimated the state of the buildings to the landlord's factor, and called upon him to have them put in tenantable order, that the factor had frequently promised to have that done but had delayed or neglected to do it, and that accordingly the pursuer had written to the factor and the landlord making the same demand. The tenant did not dispute that he had paid his rent in full every half-year.

Held, on the above averments, that the tenant had not lost his right to insist in his claim of damages.

Broadwood v. *Hunter*, February 2, 1853, 17 D. 340, and *Elmslie* v. *Young's Trustees*, March 16, 1894, 31 S.L.R. 559, *distinguished.*

Process—Appeal—Mode of Trial—Judicature Act 1825 (6 *Geo. IV. c.* 120), *sec.* 40.

The tenant of a farm sued his landlord in the Sheriff Court for payment of £100, as the amount of damage sustained by him owing to the landlord's failure to restore certain buildings on the farm, which had fallen into an untenantable condition. The defender appealed and moved that the case should be sent to trial by jury. The pursuer moved that the case should be remitted to the Sheriff for proof.

The Court sent the case to trial by jury, in respect that it was of the kind appropriated to jury trial, that the smallness of the claim was not of itself a sufficient reason for refusing that mode of trial, and that there were no special circumstances rendering the case unsuited for trial in that way.

In 1881 George Johnstone became tenant of the farm of Ringour on the estate of Airds, the property of Mrs Hughan, under a nineteen years lease.

The proprietrix and her husband bound themselves in the lease, *inter alia*, "to put a new floor in the present barn, with two rows of tiles round the sides of the walls, to raise the walls of the present stable to the height of the dwelling-house, and stall the same for four horses—the tenant carting the materials . . . also the first parties shall put the present cart-shed into repair, . . . the fences and gates on the farm to be put into tenantable condition, and to be kept up and maintained by the tenant in like condition during the currency of this lease."

The following obligation was laid on the tenant with regard to the maintenance of the houses and fences on the farm—"And with regard to the houses and fences on the premises hereby let, the said George Johnstone binds and obliges himself and his foresaids to maintain them in good and sufficient repair during the currency of this lease; and the said George Johnstone binds and obliges himself and his foresaids to leave the houses and fences in good and sufficient repair at the expiration of this lease, or at their removal therefrom."

In 1892 Johnstone raised an action in the Sheriff Court, Kirkcudbright, against Mr and Mrs Hughan, to have them ordained to execute such repairs on the granary and piggeries on his farm, as might be found to be necessary to put them in a tenantable condition. After certain procedure, the Sheriff-Substitute (LYELL) remitted to a man of skill to report on the state of the buildings in question, and the report having been given in, Mr and Mrs Hughan agreed to execute the work specified therein, and this they afterwards did.

Johnstone thereafter raised a second action against Mr and Mrs Hughan in the

Sheriff Court, in which he concluded for payment of £100 as the amount of damage which he had suffered since the year 1888, owing to the defenders having failed to put the granary and piggeries in repair when called upon to do so.

The pursuer averred—"(Cond. 3) That by about the end of the year 1887, on account of decay occasioned by the lapse of time, and not through any undue negligence on the part of the pursuer, the said granary and pig-houses had become unfit to be repaired, and required to be renewed. (Cond. 4) In consequence of said decay, the granary and pig-houses had by the end of the year 1887 become utterly unfit for the purposes of the farm . . . (Cond. 5) The pursuer frequently called upon the defenders to put said office-houses into tenantable condition. At the half-yearly rent collection in the summer of 1887, and again at every succeeding rent collection, as well as on other occasions, he intimated to the defenders' factor, Mr William Milroy, solicitor, Kirkcudbright, the state of the said houses, and called upon him to have them put into tenantable order. The said factor frequently promised to have this done, but delayed or neglected to do so, and the pursuer accordingly wrote to the said factor on 9th January 1890, and to the defender, the said Major Henry Houghton Hughan, on 11th January 1890, calling upon them to have the necessary work done."

The defenders pleaded, *inter alia*—"(4) The pursuer being by the obligations in his lease bound to keep and maintain the granary and pig-houses in question, the grounds of action are untenable."

On 27th February 1894 the Sheriff-Substitute allowed parties, before answer, a proof of their averments.

"*Note.*—This action of damages is a corrollary to a previous litigation between the same parties about the repairs of the same subjects on the same farm, and I have once more listened to the same arguments and have come to the same conclusion, viz., that it having been judicially ascertained that the untenantable condition of the granary and pig-houses on the farm of Ringour was due at the date of the previous action to lapse of time, tear and wear, and not to neglect of the part of the tenant, it was by the common law of Scotland the duty of the landlord to restore these buildings—Bell on Leases, i. 321; *Napier* v. *Ferrie*, 9 D. 1354; Rankine on Leases (1st ed.), p. 223, and the cases there quoted. The Sheriff was of the same opinion when the case was appealed, and accordingly the landlord did restore the subjects in question. Now the tenant brings this action, claiming damages on the ground that the landlord neglected this, his legal obligation, for the space of five years, in spite of repeated remonstrances, and that during all that time he (the tenant) was thus deprived of the beneficial use of these subjects. I am bound to say that I consider that a perfectly relevant averment, which if proved will entitle the tenant to damages, though I could have wished that he had specified on record with more clearness and perspicuity the actual damage which he alleges he has suffered."

The defenders reclaimed, and argued—(1) The pursuer was barred by the terms of the lease from insisting in his claim of damages. The landlord had undertaken to make certain specific repairs, and the tenant on his part had on these conditions accepted the building as in a satisfactory state, and had undertaken to do what was necessary to keep them in tenantable repair during the currency of the lease. The principle laid down in *Mosman* and *Napier* did not apply in such a case. (2) Assuming that the pursuer had a good claim of damage if he had made it timeously, he had lost his right to make such a claim, for on his own showing he had paid his rent yearly without reduction or express reservation—*Broadwood* v. *Hunter*, February 2, 1853, 17 D. 340; *Elmslie* v. *Young's Trustees*, March 16, 1894, 31 S.L.R. 559. The pursuer's averments were therefore irrelevant, and the action should be dismissed.

Argued for the pursuer—(1) The meaning of the clause in the lease was that the tenant was to keep the existing buildings in repair. It did not impose on the tenant the obligation of restoring buildings which had become dilapidated from the decay of time, and which required extraordinary repairs—*Mosman* v. *Brackell*, May 19, 1810, Hume's Dec. 850; *Napier* v. *Ferrier*, June 24, 1847, 9 D. 1354. (2) *Broadwood* and *Elmslie* were distinguishable. In both of these cases the tenant had confined himself to grumbling. Here the pursuer averred that he had made specific demand upon the landlord, and that the landlord's factor had promised that it would be complied with. The ground of complaint was also different in the present case. In *Broadwood* the tenant complained of damage by rabbits, and in *Elmslie* of damage owing to the want of heather burning and the insufficiency of the fences. In both these cases the landlord's defence might have been prejudiced by the lapse of time, but that objection did not apply with equal force to the present case.

At advising—

Lord President—I think that the pursuer has a relevant case on record. I am unable to give effect to the appellants' argument that the lease as a whole absolves the landlord from the ordinary and inherent obligation on any party letting farm buildings to keep them extant. The case here is that the untenantable condition of the granary and piggery was caused by decay—that is to say, that it was not caused by the absence of timely repairs such as fell to the tenant to make. In such circumstances there can be no doubt that the landlord is *prima facie* responsible, and it is going too far to say that because the landlord has undertaken certain specified operations by way of renewals, this completely exonerates him for the future from

doing anything more to counteract the dilapidation of the premises by decay.

As regards the argument that the tenant has discharged his claim for damages, the case does not, I think, fall within the principle of the cases of *Broadwood* v. *Hunter* and *Elmslie* v. *Young's Trustees.* The tenant here says that he did make specific claims for certain operations to be carried out, and that his claims were met by specific promises by the factor that what he required would be done. That averment supplies what was absent in the cases I have referred to, and I cannot think that the tenant has so conducted himself as to make the landlord believe that he had departed from his claim. No doubt the averments as to the damage are rather general and colourless, but I am not prepared to say that they are so insufficient as to disentitle the pursuer from going to trial.

LORD ADAM — The lease between the pursuer and defender dealt with certain matters regarding the state of the offices, and it imposed certain obligations on the landlord with regard to them, and then provided that these being done, the tenant should take them over and keep them in repair. In so far as the lease deals with these matters it is of course conclusive, but beyond these obligations there are other legal obligations on both sides with which the lease did not deal. Now, it appears that about the seventh year of the lease the granary and piggery on the farm, by no neglect of the tenant, got into a condition of natural decay, and the question is, what is the legal obligation with regard to the repair of these buildings? I agree with the Sheriff-Substitute and the Sheriff that when there is a case of what may be called extraordinary repairs (as they are called by Lord President Boyle in the case of *Napier*), the obligation to restore is on the landlord. Now, that is the case here, and therefore I think there is a relevant ground of damage stated.

It is, however, further said that the tenant is not entitled to insist in the claim, in respect that when he paid his rent in 1887 and subsequent years, he did not intimate and insist in a claim of damages. That plea is rested on the cases of *Broadwood* v. *Hunter* and *Elmslie* v. *Young's Trustees.* The plea amounts to a plea of *mora*, and always refers us to the particular circumstances in which it is pleaded. *Broadwood* was the case of a periodical claim for damage done to a farm by rabbits, and it must be observed that from the nature of the claim, if it is not made at once, the defender is not in a position to prove his defence. The case of *Elmslie* was a claim of damages for insufficient heather burning, and there it was proposed to go back for a number of years before the claim was made. Then, again, if the case had been held to be relevant, there would have been a clear injustice against the landlord, as he could not have proved all the facts as to the burning, the state of the weather in each year, and so on, necessary for his defence. That, as I understand it, is the principle of these cases, but the case here is not of that kind. In 1887 notice was given to the factor of the state in which the buildings were, and he was then and subsequently called upon to put them in repair. The factor promised to do so, but did not fulfil his promise. That being so, I do not think that the case is within the rule of the cases I have referred to.

LORD M'LAREN and LORD KINNEAR concurred.

Parties were then heard as to the mode in which the case should be tried.

Argued for the defenders—The case was of the kind appropriated to jury trial, and was fitted for trial in that way. It should therefore be so tried. In *Bain's* case there was a very special reason for sending the case back to the Sheriff, and the action was not one appropriated for jury trial.

Argued for the pursuer—The action being for breach of contract, the Court had a freeer hand than if it had been an action on delict or *quasi*-delict — *Willison* v. *Petherbridge*, July 15, 1893, 20 R. 976. That being so, looking to the nature and small amount of the claim, the most expedient course was to remit the case to the Sheriff for trial—*Bethune* v. *Denham*, March 20, 1886, 13 R. 882; *Bain* v. *Heritors of Duthil*, February 13, 1894, 31 S.L.R. 427; *Nicol* v. *Picken*, January 24, 1893, 20 R. 288.

At advising—

LORD PRESIDENT — I think the case should be sent to trial by jury, because the defender and appellant, acting no doubt with a due regard for his own interests, desires that that should be done. The action is one for damages, and, to use the words of Lord Adam in the case of *Willison* v. *Petherbridge*, "the Legislature says that such actions, when they originate in this Court, are to go to a jury unless special cause be shown why this should not be done, or the parties agree otherwise. These actions of damages may be appealed to this Court for jury trial, and that being so, we must take it that the Legislature intended such actions to be tried by jury just as if they had originated in this Court, provided the sum claimed is of the requisite amount. That amount is fixed at £40." On that ground the case must go to a jury, no special ground having been shown except such as is not really special, as it would apply to all actions of damages for breach of the contract of lease.

LORD ADAM concurred.

LORD M'LAREN — Considering that the object of the statutory provision is to give a defender the option of having the case tried by jury, it is obvious that we can only in exceptional circumstances refuse him that privilege and remit the case to the Sheriff. I agree that there are no exceptional circumstances here. The smallness of the sum claimed may be an element of consideration when there are other grounds for taking that course, but

here there is no other ground but the small amount of the claim, which is more than double the amount that entitles a defender to appeal for jury trial. It sometimes happens that the appeal is taken for the purpose of raising the question of relevancy, and it has been held, after the argument on the relevancy has been disposed of, that if the defender does not insist on a jury trial, we may send the case to a Lord Ordinary or remit to the Sheriff, whichever course may seem most expedient. But here the defender maintains his right to go a jury, and he is entitled to have the case remitted to a jury for trial.

LORD KINNEAR — I am of the same opinion. There is nothing in the nature of the case to render it unsuited to jury trial, and the smallness of the sum at stake is not of itself a sufficient ground for refusing to send the case to a jury.

The Court approved of an issue and sent the case to jury trial.

Counsel for the Pursuer—Wilson. Agent—David Crawford, S.S.C.

Counsel for the Defenders—H. Johnston—Macfarlane. Agents—Mackenzie & Kermack, W.S.

Wednesday, May 23.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

MIDDLETON *v.* LESLIES.

(*Ante*, vol. xxx. p. 657.)

Property—Restriction on Building—Superior and Vassal—Feu—Disposition.

A superior who had erected a tenement containing dwelling-houses which consisted, some of four and some of three rooms, feued a piece of ground in the same street under the restriction that the vassal should be bound to erect on the ground disponed dwelling-houses "similar in style and quality," and not exceeding in height the houses already erected by the superior. The vassal erected a tenement containing dwelling-houses which consisted of three and two rooms each.

Held that the tenement erected by the vassal was not in violation of the stipulation in the feu-disposition.

In May 1889 Alexander Middleton, proprietor of the lands of Belmont, Aberdeen, feued a piece of ground on the south side of Belmont Road to Roderick M'Kay.

By the feu-disposition it was provided, *inter alia*, as follows—"The said Roderick M'Kay and his foresaids shall be bound within two years from the date of entry, under these presents, to erect on the ground hereby disponed, one or more dwelling-houses, or shops and dwelling-houses combined, similar in style and quality to and not exceeding in height the houses already erected by me on the south side of Belmont Road foresaid, or cottages, or two-storey houses (which however shall have no attics therein for occupation as dwelling-places, other than personally by tenants or others occupying the first or second floors of such dwelling-houses, subletting of said attics being excluded), not inferior to those on the north side of said road, but having the north or front walls thereof built of dressed or hammer blocked ashlar work of granite stone, . . . and which building shall be of the value of at least £1000 sterling; and my disponee is hereby specially prohibited from placing in the roofs fronting to Belmont Road of the houses to be erected by him as aforesaid, projecting windows of any kind whatever, but such widows as are placed in the said roofs shall be flush with the same; but declaring that this prohibition does not apply to any cottages to be erected by my said disponee as aforesaid, the roofs of which may have projecting windows; and my disponee and his foresaids shall be bound to uphold and maintain the said buildings in good and complete repair, or to erect or maintain other buildings of equal value and quality thereon . . . in all time coming; and that as a security to me and my foresaids . . . for the due payment of the feu-duty hereinafter stipulated." . . .

In the same year Mr M'Kay disponed the subjects feued to him to Miss Isabella and Miss Helen Leslie.

In 1891 Alexander Middleton raised an action against the Misses Leslie to have them ordained forthwith to erect buildings in accordance with the terms of the feu-disposition, and in the event of their failing so to do within twelve months, or such period as might be fixed, for payment of damages.

On 19th May 1892 the First Division decerned the defenders (*ante*, vol. xxx. p. 657), in implement of the obligations contained in the feu-disposition, to erect within one year from that date one or more dwelling-houses, or shops and dwelling-houses combined, as specified in the summons and feu-disposition.

In January 1893 the defenders submitted to the pursuer the plan of the buildings which they proposed to erect, but the pursuer objected that the plan was not in accordance with the stipulations of the feu-disposition. The defenders, however, proceeded to erect the buildings in accordance with the plan, and in March the pursuer brought an action in the Sheriff Court of Aberdeen to have them interdicted from doing so. This action was subsequently ordered to be transmitted to the Court of Session *ob contingentiam*, and was conjoined with the action of implement and damages. Pending these proceedings the defenders completed the buildings which they had begun to erect.

The pursuer was afterwards allowed to amend his record in the Court of Session action by adding averments to the effect that the defenders' buildings were not in accordance with the stipulations of the feu-contract, but were inferior in style and