question of health, then a proof must be allowed. I think that the judgment in *Macdonald* means that it must be allowed, those facts being directly relevant to the problem, which is a complicated one of medical opinion, but of medical opinion to be affected by those facts.

When I turn from that case to the present, it seems to me that all the elements which were held in *Macdonald's* case to lead to a proof are absent, for I think that the Lord Ordinary has rightly characterised the respondents' averments. Therefore upon that ground I am of opinion with your Lordships that the Lord Ordinary is right, and that there is no sufficient averment for inquiry by way of proof. And I part from this by saying that Mr Johnston's very clear exposition of his argument postulated, what he hinted was his case, that there were facts in the history of the heir's life which should be investigated. But averments of such facts are entirely absent.

As regards the question of value, it seems to me that it is in a different position. Here again the Court is not tied to any one form of inquiry. I suppose your Lordships would agree that if the respondents came forward with a definite view of the value, the Lord Ordinary might order a proof. On the other hand, he might not, and he might rest content with the opinion of an expert. But I am bound to say that I should greatly regret if it were inferred from the decision in this case that a momentous question of value, even when it depended merely upon an estimate of value, was to be concluded against an objecting respondent by the opinion of one individual. I see nothing in the statute to warrant that. The Court is to "ascertain," but to ascertain by means appropriate to the interests involved; and I for my part should have great hesitation in refusing the request of any party who promptly came forward and asked for a proof. But then your Lordships consider that in the present case the respondents have so conducted themselves and managed their procedure that the other course has been definitely embarked upon. That is a question of inference from the circumstances; your Lordships have had much greater experience than I in such matters; and upon that ground, and that alone, I concur.

The Court adhered.

Counsel for the Petitioner—Guthrie, Q.C. —Chree. Agents—A. P. Purves & Aitken, W.S.

Counsel for the Respondents—H. Johnston, Q.C.—C. K. Mackenzie. Agent—A. S. Douglas, W.S.

Thursday, July 20.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

A. & J. FAILL *v.* WILSON.

Lease—Quarry—Outgoing—Breach of Conditions of Working — Competency of Action for Implement at Expiry of Lease.

Where at the expiry of a lease of a quarry which contains provisions as to the condition in which the quarry is to be left by an outgoing tenant, the landlord founds, not on a breach of these conditions, but on violation of the course of working prescribed to the tenant during the whole course of his occupancy, the proper claim is for damages, and an action for the execution by the tenant of remedial measures is incompetent.

Lease—Breach of Conditions of Working —Renewals of Lease as Bar to Objections.

An action was raised at the instance of a landlord against an outgoing tenant founded upon certain alleged breaches of the conditions of the lease during the whole course of the tenancy. There had been two extensions of the lease during the period without the landlord having suggested that the conditions were being violated.

Circumstances in which *held* that there had been no breach. *Observed* that the fact that no objection had been taken at the time to the course of working adopted by the tenant, and the subsequent renewals of the lease, were important elements in showing that there had been substantial compliance with the provisions of the lease.

By minute of lease dated 28th December 1882, entered into between the trustees of Mr and Mrs Steel, and Mr William Wilson, contractor, Kilsyth, of the second part, the first parties let to the second party the whinstone quarry of Overcroy, Dumbartonshire, for the period of five years from Candlemas 1883. The lease contained the following provisions—"*Second*, The second party binds himself to carry on the operations of quarrying and removing stone in a regular and systematic manner with one continuous wall or face; and always to quarry out the whole rock to the level or bottom as the work proceeds; and when breaking ground, to preserve and carefully lay aside what arable soil may be obtained; as also to deposit the whole tirring and refuse of the workings on the ground quarried out, and spread the same, with all such arable soil, on levels corresponding with the adjacent lands; the whole operations to be performed to the satisfaction of the first parties or their surveyor, who shall at all times have access to the whole workings and operations; and the tenant shall also be bound regularly to drain off the water from the quarry workings, and to erect, so far as not already done, and maintain at all times sufficient fences

round the workings, so as to prevent injury to persons, cattle, or otherwise; and should he fail to perform any of these conditions, the first parties are empowered, if they see proper, to have the same done at the tenant's expense. *Sixth*, The said William Wilson binds and obliges himself and his foresaids to flit and remove from the subjects hereby let at the termination of this lease without any warning or process of removal, and to leave the workings in a clear and upredd state, and the ground free of heaps of rubbish and stagnant water."

In 1888 this lease was extended by the parties for a period of five years under the same conditions, except that the rent should be payable in advance. In 1894 there was another extension of the lease for a further period of five years as from Candlemas 1893, at a modified rent, the other conditions remaining unchanged. In 1895 the quarry was acquired from Steel's trustees by Messrs A. & J. Faill, contractors, Glasgow, together with the whole rights of the trustees in the lease, and by a supplementary assignation the trustees conveyed to them their whole right to enforce the obligations under the lease, and to recover damages for the nonfulfilment thereof. On 30th July 1895 Messrs Faill, who claimed that under the lease and extensions they were entitled to terminate the lease at Candlemas 1896, intimated to Mr Wilson their intention of doing so at that date.

In April 1896 Messrs Faill raised an action in the Sheriff Court of Lanarkshire against Mr Wilson, in which he craved the Court (1) to find that the lease was validly terminated at Candlemas 1896, and (2) to ordain him to remove from the quarry. The action concluded also for declarator "that the defender, during his tenancy of the said quarry and pertinents thereof, did not work the said quarry in terms of the said minute of lease and relative memoranda of agreement, but contravened the stipulations thereof by not carrying on the operations of quarrying and removing stone in a regular and systematic manner with one continuous wall or face; or quarrying out the whole rock to the level or bottom as the work proceeded; or when breaking ground, preserving and carefully laying aside what arable soil might be obtained; or depositing the whole tirrings and refuse of the workings on the ground quarried out, and spreading the same with all such arable soil on levels corresponding with the adjacent lands; or maintaining the quarry road made in the said quarry prior to their tenancy thereof; and particularly by the defender in contravention of said lease, and of the universal usage of trade in quarrying stone," in failing to leave the quarry free for working by leaving large quantities of rubbish at various places.

There was also a conclusion (4) "to ordain the defender forthwith—(1) To remove the rubbish, tirrings, and material deposited by him against the west face of said quarry as aforesaid, and the refuse or other material deposited on the quarry floor as aforesaid; (2) to excavate the rock beneath the existing quarry floor to a depth on the average of 3 feet below the existing quarry floor, so far as formed by the defenders, and to form a new quarry floor at said depth, on the level and in the manner that may be approved by the surveyor of the pursuers; (3) to restore the roads in and through the said quarry to their original and natural levels; (4) to deposit all soil, rubbish, and tirrings removed, and that may be removed by the defender from the said quarry, alongside the ground at the back of the workers' houses belonging to Messrs William Baird & Company;" and to perform certain other operations to the pursuers' satisfaction. There was an alternative claim for damages.

The pursuers made averments in support of the declaratory conclusions with reference to the alleged improper working by the defender, and pleaded—"(1) The pursuers having terminated the defender's lease of said quarry at Candlemas last, the pursuers are entitled to declarator as craved, and the defender should be ordained to remove forthwith from said quarry and pertinents thereof, and interdicted from continuing working thereat. (2) The defender having contravened the stipulations of said lease and memoranda in the manner stated, the pursuers are entitled to declarator and decree as craved, and the defender should be ordained to perform the work craved so as to restore the quarry to the condition it would have been in had it been properly wrought in terms of the lease and memoranda, and to leave the workings in a clear and upredd state, and the ground free of heaps of rubbish; or alternatively, the defender not having worked the said quarry in terms of universal usage in quarrying, the pursuers are entitled to the remedies craved."

The defender admitted that he had not quarried out the whole rock to the level of the bottom; that he did not lay aside the arable soil; that he did not spread the same on the tirrings and refuse; that he tipped a considerable quantity of tirrings over part of the western face of the quarry so as to cover part of the rock; that in working northwards he had gradually raised the level of the quarry floor. He denied the other allegations, and averred — "The pursuers' predecessors, who owned the quarry during the tenancy of the defender and the previous tenants, acquiesced in the manner in which the quarry has all along been wrought. They were all along aware of what was being done, and that it would cost great trouble and expense to the tenant to undo what has been done during all these years. No objection was ever taken by the pursuers' predecessors to the defender's method of working, and in 1894 they reduced his rent from £50 to £45 per annum. No appreciable benefit could have accrued to the pursuers' predecessors by insisting upon the defender complying literally with the terms of the lease." . . .

He pleaded—"(1) No title to sue. (2) The action is irrelevant. (3) The pursuers' claim

is barred by the acquiescence of their predecessors."

The Sheriff-Substitute (BALFOUR) on 20th July 1896 pronounced an interlocutor, by which he repelled the defender's first two pleas, and ordained him to remove from the quarry, and *quoad ultra* allowed parties a proof.

The defender appealed to the Sheriff, who recalled the interlocutor appealed against, and dismissed the action so far as regards the first two conclusions, and *quoad ultra* allowed a proof.

The defender appealed to the First Division, who on 4th February 1897 refused the appeal, and remitted to the Sheriff to proceed.

A proof was taken, to which it is unnecessary to refer, and the Sheriff-Substitute on 3rd February 1898, after finding in fact that the defender had failed to fulfil certain obligations in his lease, ordained him to execute practically the whole of the operations craved for in the fourth conclusion of the summons.

The defender appealed to the Sheriff, who on 19th July 1898 pronounced an interlocutor by which he found that "the pursuers have failed to prove to what extent any apparent want of compliance with or breach of the conditions of the lease is attributable to the defender as compared with previous tenants, and have also failed to prove to what extent breaches of the lease have been committed by him since the lease was last renewed: Finds that no complaints either as to the system of working the quarry followed by the defender, or as to the details of the working, were made at any time by the previous landlords, Steel's trustees, and that on the case as presented in the proof the pursuers are not entitled to insist in their claim in the action: Therefore recals the interlocutor appealed against, and assoilzies the defender from the conclusions of the action," &c.

The pursuers appealed to the First Division, and argued—Acquiescence had not been proved against them, nor did the rule of waiver apply when the landlord had at any moment the right to step in and interfere—*Lamb* v. *Mitchell's Trustees*, February 23, 1883, 10 R. 640; *Cowan* v. *Kinnaird*, December 15, 1865, 4 Macph. 236; *Bickett* v. *Morris*, July 13, 1866, 4 Macph. (H.L.) 44. 2. The form of remedy was competent, the defenders were not entitled to found upon the expiry of the lease in order to escape performing the obligations which they ought to have performed during its currency—*Carron Co.* v. *Donaldson*, February 25, 1858, 20 D. 681.

Argued for respondents—1. This was a clear case of acquiescence on the part of the pursuers, who had renewed the lease without raising any objection to the defender's methods of working—*Muldoon* v. *Pringle*, June 9, 1882, 9 R. 915; *Carnegie* v. *Guthrie*, December 22, 1866, 5 Macph. 253; *Baird* v. *Graham*, March 6, 1852, 14 D. 615. 2. The conclusion *ad factum præstandum* was incompetent. The lease was at an end, and the tenant had not performed his obligations under it; the remedy of the landlord was an action for damages—*Sinclair* v. *Caithness Flagstone Company*, March 4, 1898, 25 R. 703.

At advising—

LORD PRESIDENT—We shall be greatly aided in considering this case by steadily keeping in mind what the action is not and what it is. It is not an action of damages, or at least the pursuers' counsel allowed that they have not made out a case of damages. It is not an action to enforce fulfilment of the sixth clause of the lease, which prescribes the final duties of an outgoing tenant. On the other hand, it is an action *ad factum præstandum*, and it is founded on the second clause, which prescribes the duties of the tenant during the whole currency of the lease. At the same time, while founding on the second clause, the action, brought as it is on the expiry of the lease, does not seek the specific fulfilment of the continuing duties of a sitting tenant, but it seeks an order on the outgoing tenant now to undo a great many things which he is said to have done during the course of his possession in violation of that second clause.

I have said that the action is brought on the expiry of the lease, and it must be remembered that the original theory of the action (expressed in a declaratory conclusion) was that the lease had already expired, viz., at Candlemas 1896, the action being raised in the following April. The Court ultimately held that the lease did not come to an end till Candlemas 1898, but the pursuers adhered to their original contention till after the final judgment on that subject of 4th February 1897. They then decided to go on with the remaining conclusions of the action, viz., those now under consideration. By this time, indeed, the lapse of time had almost brought the action abreast of original theory, for the tenant was within his last year when the procedure recommenced, and when the pursuers took from the Sheriff-Substitute an operative decree the lease had expired. The application for that decree was therefore ultimately made as well as originally prepared against an outgoing tenant.

On this statement the action is one which in any circumstances would be difficult to support. Where at the expiry of a lease which contains what is sometimes called a redding-up clause, the landlord founds not on it but on violation of the course of working prescribed to the tenant during the whole course of his occupancy, the natural claim is for damages, and not for the execution of remedial works. Various circumstances in the present case raise this difficulty to an impossibility.

When the second clause is examined, we find that the rules laid down apply to the continuing and progressive work of the quarry during the many years of the lease. Again, the rules are somewhat general and the things prescribed are not things which there is only one way of doing. Again, the matter is complicated by it being necessary so to do some of the things that you may at the same time be doing others. Further, if

you begin acting in one way, you cannot easily in some instances change your course and adopt another mode of fulfilment.

To take specific instances, one of the complaints of the pursuers is that the defender has not worked in a regular and systematic manner with one continuous wall or face, but then he is said to have failed to do so, because he has deposited rubbish in a certain place, although the rubbish is deposited on ground quarried out, which is what the lease in general terms prescribes. What the pursuer demands is that the tenant shall now remove all the rubbish which has day by day been depositing for years, and shall redeposit it in another part of the quarry. Again, the pursuers, on a construction of the lease, which does not define any level, say that the defender, as the result of his workings through fifteen years, has left the floor of the quarry too high, and they ask that he shall now quarry out the stone till he brings it to a proper level.

Now, it is quite plain that what is asked in these particulars is not specific implement—it is undoing or redress. Again, it is not reinstatement against some one illegal act, for in such a case the reinstatement can be promptly and specifically effected as a summary remedy. The operations now claimed are the laborious undoing of a process which has been going on for years. It is my opinion that the pursuers could not claim as one of their legal remedies that the defender shall be set to do this work, even if his case of breach of contract were made out. His true claim is one of damages.

On the facts, however, I do not think that the pursuers have made out their case; and the facts must be considered with continuous reference to the lease. The alleged violations are not, so to speak, point blank or categorical violations, and they occur in matters where there are several ways of doing what is required. Along with this must be taken the highly important provision of a right of access and inspection on the part of the landlord, and the corresponding words that the several things are to be done to the satisfaction of the landlord. Now, in the present case the alleged transgressions have been going on day by day for years, and the landlords made no sign. Not only so, but there have been two extensions of the lease without any hint that the lease thus extended had been and was being daily violated in material particulars; and it is to be observed that the pursuers have admittedly not established any violation subsequent to the last extension. These facts taken together constitute highly cogent evidence that the work was conform to the lease and to the satisfaction of the landlord. I do not say that if the complex requirements of the lease be split up, it has been proved that there has been specific fulfilment of each. But those requirements being relative, are to be taken as a whole, more especially in a retrospect of the proceedings under the lease. There is in the proof the evidence of very competent observers that the defender could not have concurrently fulfilled the several provisions of the lease more completely than he has done. There is not, on the other hand, such evidence as overcomes what in my opinion is the salient fact in the case, the approval of the landlords, tacit in their non-intervention, and overt in the renewals of the lease.

On these grounds, both on the inapplicability of the proposed remedy and on the pursuers' failure to prove violation of the lease, I am for maintaining the absolvitor which the Sheriff has granted.

Lord M'Laren and Lord Kinnear concurred.

Lord Adam was absent.

The Court pronounced this interlocutor:—

"Find that at the date of the action, 21st April 1896, the defender had been for about sixteen years tenant of Overcroy quarry, having succeeded other tenants in the occupation and working thereof, and that at the said date he was tenant of the quarry in terms of a renewal for five years from Candlemas 1893, granted in 1894 by the then proprietors, Steel's trustees, of a lease originally granted by them to the defender for a period of five years from Candlemas 1883, and subsequently renewed for other five years in 1888, the last renewal from Candlemas 1893 having been on the same conditions as the original lease, excepting that the terms at which the rent was payable were different, and that the amount of the rent was reduced from £50 to £45 a-year: Find that in 1895 the pursuers purchased the quarry from Steel's trustees and obtained from them an assignation to their rights under the said lease and renewals thereof: Recal the other findings in the interlocutor of the Sheriff dated 19th July 1898: Find further that this action was raised in April 1896, and, *inter alia*, sought to have it declared that the extended lease came to an end at Candlemas 1896, and that the defender should be ordained to remove: That dismissal of these conclusions was granted and adhered to by the Court of Session in February 1897, and that thereafter the pursuer insisted in the Sheriff Court in the remaining conclusions: Find in law that these conclusions in so far as directed *ad factum præstandum*, which are founded on violations of the second clause of the lease, are inappropriate to the case of an outgoing tenant: Further find in fact that the pursuers have failed to prove any violation of the lease: Therefore affirm the absolvitor granted by the Sheriff to the defender in the said interlocutor of 19th July 1898 appealed against, and decern: Find the defender entitled to expenses both in this and in the Sheriff Court, and remit," &c.

Counsel for the Pursuers—The Sol.-Gen. Dickson, Q.C. — Cook. Agent — Campbell Faill, S.S.C.

Counsel for the Defenders — Salvesen. Agents—Simpson & Marwick, W.S.