rule that arbiters must forthwith issue their award. It is a matter of discretion and of circumstances what procedure they shall adopt, and when they shall proceed. There is in the present case apparently a somewhat complicated problem before the arbiters, and one of them considers that the existing circumstances of the pits and machinery render it impossible for the time duly to carry out the valuation, and that the work should be deferred till those conditions have ceased. Whether this view be correct depends upon a variety of circumstances, and on the determination of disputed facts. The case is further complicated by an averment in the answers that Mr Rankine is disqualified from acting as arbiter.

Now, I do not think that a summary petition is an appropriate proceeding for deciding such questions. To say so is not the same as saying, and I do not say, that a summary petition to compel arbiters to proceed in a submission is on the face of it and necessarily an incompetent proceeding. It may quite well be that when some specific duty is plainly and immediately incumbent on an arbiter, the Court may be asked by summary petition to order him to do it, and the mere fact that an ordinary action would lie for the same purpose would not necessarily exclude the competency of the application. But the appropriateness of such a petition depends not merely on its prayer, but on the nature of the question, or set of questions, which has got to be solved, and this is to be ascertained by reference to the answers as well as to the petition. Of course no respondent by merely setting up some defence, and especially some defence of apparent complexity, will be able to elude the application of a summary remedy if otherwise appropriate; the court must consider *prima facie* the quality of the defence and the genuineness of the dispute. On an examination of the record here I think that there are questions to try of some complexity and involving disputed facts, and that a petition is therefore an inappropriate proceeding.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I agree. But I desire to add that in my opinion there is enough in the proceedings before us to show that the course taken by the arbiter, Mr Robertson, in declining to meet his co-arbiter and to hear parties on the question of procedure was not a proper one. I am far from saying that the arbiters were bound to issue an award. For the reasons your Lordship has stated I think that question is not properly before us. But the arbiters were rightly advised by the clerk to the reference that if they were not prepared to issue an interim award they were bound to hear parties' agents or counsel on the question of delay. I do not think it doubtful that this was sound advice. The arbiters should have met to hear parties and considered the motion to proceed. For one arbiter is not entitled to decide any question for himself without consulting his co-arbiter. They are bound to hear parties and deliberate together, so that they may endeavour to reach a just conclusion in which both may agree, and if they fail to agree after such deliberation, the parties, as well as the arbiters themselves, should have an opportunity of considering whether their difference is such as to necessitate a devolution. I do not understand your Lordships to hold that if the petition had merely required the arbiters to meet and hear the parties, and to proceed as should be just, the objection which must be sustained to the petition as it is presented would have been equally applicable.

The Court refused the petition.

Counsel for the Petitioners—H. Johnston—Dewar. Agents — Simpson & Marwick, W.S.

Counsel for the Respondents—Lord Advocate (Balfour, Q.C.)—Dundas. Agents—Dundas & Wilson, C.S.

Wednesday, February 13.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

CRAWFORD *v.* PATON.

Process — Proof or Jury Trial —Lease — Repair of Farm Buildings—Action for Breach of Contract.

A tenant raised an action of damages against his landlord for alleged breach of contract in failing to keep certain farm buildings in repair.

Held that the case of *Johnstone* v. *Hughan*, May 22, 1894, 21 R. 777, did not lay down any general rule that all cases of breach of contract must go to a jury, but that it was within the discretion of the Court in each case to decide as to the appropriate mode of proof.

Observed (by Lord M'Laren) that the case of *Johnstone* was distinguishable from the present, inasmuch as it was an appeal for jury trial from a Sheriff Court.

Thomas Crawford, farmer, Craigend, Slamannan, brought an action of damages against his landlord James Paton, Esquire, of Avonhill, for breach of contract, on the ground that he had failed to implement the obligations of the lease with respect to the upkeep of the farm buildings and the introduction of a proper water supply.

Upon 16th January 1895 the Lord Ordinary (STORMONTH DARLING) closed the record and appointed issues to be lodged.

The defender reclaimed, and argued—The case should be tried by a judge without a jury. The Lord Ordinary had ordered issues without exercising his own discretion in the matter, on the ground that

he had no option to do otherwise, looking to the case of *Johnstone* v. *Hughan*, May 22, 1894, 21 R. 777. No doubt that case was also founded on breach of contract, and was raised by a tenant against his landlord for failure to keep up the farm buildings, but there was no claim there analogous to the one here respecting the water supply, and it did not lay down the rule that all such cases must be tried by a jury. This was not one of the enumerated classes of actions which of necessity went to a jury. In actions such as the present it was for the judge to decide the appropriate mode of trial in each case. Further, the cases of *Johnstone* and of *Willison* v. *Petherbridge*, July 15, 1893, 20 R. 976, were appeals for jury trial brought from sheriff courts under the provisions of the Judicature Act 1825. Here the case had been raised in the Court of Session. It was founded on breach of contract and raised questions of law with regard to the rights and obligations between landlord and tenant, which could more suitably be determined by proof than by jury trial.

Argued for the pursuer—This was practically an action of damages. It could not be said that it was not suitable for jury trial, and as it was very similar to that of *Johnstone*, there was no reason why the course there adopted should not be followed here. The fact that there was an additional ground for damages here made no difference, although it might necessitate the adoption of two issues.

At advising—

LORD PRESIDENT—What the Lord Ordinary has done is to close the record and assign a day for the adjustment of issues. That seems a very natural course to take as a tentative step towards ascertaining by the test of the issues what is the quality of the case and whether it is suitable for proof or for jury trial.

The defender has reclaimed against this somewhat innocuous step, but he has explained to us that the Lord Ordinary proceeded on the ground that he was bound to send this case to jury trial in consequence of the decision in the case of *Johnstone* v. *Hughan*. That certainly was a case about farm buildings which had fallen into disrepair and it did go to jury trial, but that case rested upon a particular contract, and the question whether the landlord here is liable in damages to his tenant will fall to be considered by the Lord Ordinary when he has been brought to close quarters with the case by having the issues before him.

As to the second part of the case, that relating to the water supply, I am surprised that the defender, or for that matter the pursuer, should think that the case of *Johnstone* v. *Hughan* had any resemblance to the present one. The pursuer did not furnish us with any legal principle upon which this claim is rested, but the Lord Ordinary will be better able to judge on this also when he has the issues before him. It therefore seems to me that we should refuse this reclaiming-note. I do not think that the case of *Johnstone* v. *Hughan* has any binding effect of this kind, that every case of breach of contract must necessarily go to a jury. That will depend upon the circumstances of the particular case. I do not go back upon any thing said in *Johnstone* v. *Hughan*, either as regards the responsibility of the landlord or as to the proper procedure with regard to proof, but it may be well that this explanation should be made.

LORD ADAM concurred.

LORD M'LAREN—I concur, and would only add that *Johnstone* v. *Hughan* had this peculiarity; it was an appeal under the 40th section of the Judicature Act for jury trial, and it has been held that as the right to appeal is given by statute in order that the party appealing may have jury trial, we ought not, unless in very exceptional circumstances, to send such cases to a judge without a jury. We are not here deciding any general rule as to cases having reference to repairs of farm buildings, or as to cases arising in this Court being tried by proof or jury trial.

It is open to the Lord Ordinary to use his discretion as to the mode of inquiry, but I may say that I do not see any inconvenience arising from trying such cases with a jury, assuming that the claim has a legal foundation, and that the question for trial is the amount of the damage.

LORD KINNEAR—I am of the same opinion. I think the Lord Ordinary should consider, when the issues are before him, and when the question between the parties in this case has been formulated, whether proof or jury trial is the more suitable.

I would only add that I concur in the observations made with regard to the case of *Johnstone* v. *Hughan*.

The Court refused the reclaiming-note, and remitted the case to the Lord Ordinary.

Counsel for the Pursuer — Salvesen — W. Thomson. Agent — W. Croft Gray, Solicitor.

Counsel for the Defender — Wilson. Agents—Strathern & Blair, W.S.

Wednesday, January 30.

SECOND DIVISION.

[Sheriff of Renfrew.

MAINS & M'GLASHAN *v.* BLACK.

Partnership — Mandate — Power of One Partner to Bind Firm.

Held that where one of the partners of a firm, without an express mandate, attended a meeting of creditors of a debtor of the firm, and agreed to a composition arrangement, he bound the firm, and that the firm were precluded thereafter from suing for their full debt.

Mains & M'Glashan, silk and woollen yarn