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

merchants, Glasgow, raised an action in the Sheriff Court at Paisley, under the Debts Recovery (Scotland) Act, 1867, against James Black, draper, Paisley, for payment of £28, 5s. as due for a trade debt.

The defender admitted that the debt had been due, but pleaded that the pursuers were barred from suing for the whole sum in respect that Mr T. Mains, one of the partners of the pursuers' firm, had attended a meeting of the defender's creditors upon March 23, 1894, and at that meeting had agreed upon the part of his firm to accept a composition arrangement proposed by the defender of 15s. in the £.

Proof was allowed, the result of the evidence being as follows:—It appeared that Mr M'Glashan had usually charge of the defender's account, but that he was away from home at the time of the meeting of creditors, and that Mr T. Mains attended. Mr Mains received no special authority from M'Glashan to attend the meeting or agree to a composition arrangement, but he took a prominent part in the meeting, assented to the composition arrangement, and congratulated Black upon the satisfactory ending of the meeting. On being informed of the arrangement which had been made, M'Glashan refused to consent to it. All the creditors, with the exception of the pursuers, acceded in writing to the composition arrangement.

Upon July 10, 1894, the Sheriff-Substitute (COWAN) pronounced this interlocutor—"Finds in fact that the pursuers concurred in an arrangement by which the defender's creditors agreed to accept a composition of 15s. per £ on their debts, payable at three, six, nine, and twelve months: Finds in law that they are precluded thereby from demanding full payment of their debt. Therefore dismisses the action as laid, and decerns, &c.

The pursuers appealed, and on July 24th the Sheriff (CHEYNE) pronounced this interlocutor—"Recals the Sheriff-Substitute's interlocutor, of date 10th inst.: Finds in fact (1) that the correctness of the pursuers' account is admitted; (2) that the defence is that the action is precluded by the alleged fact that the pursuers at a meeting of the defender's creditors, held on 23rd March last, agreed to accept a composition of 15s. in the £, payable in four instalments at three, six, nine, and twelve months, then offered by the defender; and (3) that the fact upon which the defence rests has not been established, and, as the legal result of these findings, repels the defences, and decerns against the defender for payment to the pursuer of the sum of £28, 5s. sterling, &c."

"*Opinion.*— . . . But the creditor here is not Mr Mains, but the firm of which he is a partner, and accordingly the question arises whether his actings at the meeting bind the firm? Now, according to my understanding of the law, the compromise of a debt like the entering into a submission is outwith the ordinary implied mandate of a partner, and if that be a sound view, then the firm cannot be held to be bound here, unless it is shown that express authority to compromise existed previously, or was given at the time. [*The Sheriff then examined the facts*]. So far therefore as the evidence goes it is quite possible that Mr M'Glashan was entirely ignorant about the meeting until the result of it was reported to him by Mr Mains, when he at once took up the position to which he has adhered, that he would not concur in the arrangement recommended by the meeting. In these circumstances I am, somewhat reluctantly I own, forced to the conclusion that the pursuers have not been proved to have accepted the composition offer, and are consequently entitled to decree."

The defender appealed. Authorities—Bell's Comm. (7th ed.), 393, 398; *Anderson* v. *Sturky, Fletcher, & Company*, March 2, 1813, F.C.

At advising—

LORD YOUNG—In this case I am clearly of opinion that the the Sheriff-Substitute came to the right decision, and that the Sheriff was in error. I think it is quite clear according to our law—and no authority was stated to the contrary—that when a customer of a trading company calls a meeting of his creditors, any partner of the company may attend and act for behoof of the company in making arrangements for the payment of the customer's debts or in agreeing to a composition. It would be most inconvenient, and a thing that was never heard of, that all the partners must be present at the meeting, or that a mandate must be given by them all to one partner to attend the meeting and take part in the proceedings, and I think it is certainly carrying on the company's business for one of the partners to attend and take a part in a meeting of creditors.

In this case one of the partners did attend the meeting of creditors, took an active part in the proceedings, and agreed to take a composition of 15s. in the £ for their debt; both the Sheriffs are agreed that that fact is clearly proved. The partner who attended the meeting communicated the result to the only other partner of the firm, who had not been present at the meeting, and as the result of the conference he writes the letter we have in process, which amounts to a refusal to agree to the composition arrangement. Now, I must say the proposal to disregard that composition arrangement, which was clearly proved to have been made, on the grounds that the partner of the firm who entered into it was acting without authority, and not in the line of the company's business, is a proposal to which I cannot give my assent. In my opinion the Sheriff-Substitute was right, and the Sheriff was not forced, by any right view of the law, as he describes himself to have been, to come to the conclusion which he did. I think the defence is a good one and ought to be sustained.

LORD RUTHERFURD CLARK—I agree.

LORD TRAYNER—I have no doubt whatever that one partner of a firm has an im-

plied mandate and power to attend a meeting of creditors of one of the partnership debtors, and, for the partnership, to enter into a composition arrangement which would be binding on the partnership.

The LORD JUSTICE-CLERK concurred.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the appeal against the interlocutor of the Sheriff of 24th July 1894, Recal the same: Affirm the interlocutor of the Sheriff-Substitute of 11th July 1894, and remit the cause back to the Sheriff-Substitute to pronounce decree accordingly," &c.

Counsel for the Pursuers — Macaulay Smith. Agents—Patrick & James, S.S.C.

Counsel for the Defender—Guy. Agents —Sturrock & Sturrock, S.S.C.

Friday, February 1.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

GREAT NORTH OF SCOTLAND RAILWAY COMPANY *v.* HIGHLAND RAILWAY COMPANY.

Arbitration — Submission — Award — Construction — Admissibility of Extrinsic Evidence.

By agreement to refer, dated 18th June 1886, the Highland and the Great North of Scotland Railway Companies submitted to the decision of Mr Beale as arbiter the following question:—"Whether the proviso of section 82 of the Highland Railway Act 1865 applies to traffic exchanged under the Great North of Scotland Act 1884 between the two companies at Elgin, or whether the receipts of such traffic are to be divided between the two companies respectively in accordance with their respective mileage, and under the rules of the Clearing House?"

The arbiter in his award, dated 9th July 1886, awarded and determined "that the proviso of section 82 of the Highland Railway Act 1865 . . . does not apply to traffic exchanged under the Great North of Scotland Act 1884 between the two companies at Elgin," and further "that the receipts of such traffic are to be divided between the two companies respectively in accordance with their respective mileage and under the rules of the Clearing House."

In an action raised by the Great North of Scotland Railway Company against the Highland Railway Company for implement of the award, the defenders asked that they should be allowed a proof of the following averment by them:—"The terms 'traffic exchanged under the Act of 1884 between the two companies at Elgin,' occurring in the question submitted to Mr Beale, do not include, and were understood by the parties not to include, passenger traffic. This was explained to Mr Beale, and he and both the parties acted in the whole proceedings before him on the footing that no question as to the division of passenger traffic receipts was submitted to him, and he accordingly decided no question as to the division of passenger traffic receipts."

The Court (*aff.* the judgment of Lord Wellwood) *refused* to allow the proof asked for by the defenders, on the ground that the questions put to the arbiter and his answers thereto were distinct and unambiguous.

By the Highland Railway Act 1865 (28 and 29 Vict. c. 168) the undertakings of the Inverness and Aberdeen Junction and the Inverness and Perth Junction Railway Companies were dissolved, and the whole united as the Highland Railway Company. By section 82 it was provided that the Highland Company should afford the Great North of Scotland all needful accommodations and facilities for through traffic, and should be bound to accept from the Great North of Scotland Railway Company the same mileage rate in respect of competitive traffic passing *via* Aberdeen as they were for the time charging in respect of similar traffic passing *via* Dunkeld: "Provided always that the rates and charges shall be calculated as if the traffic passed over the shortest distance, that the lines of the company, and the lines of or worked by the said Great North of Scotland Railway Company in connection would give, and out of such charges the company shall receive its full mileage proportion of the distance which the traffic passing over their railways has actually traversed." . . .

Section 83 provided that "In all cases through traffic, whether by railway or otherwise, passing between the lines of the companies to or from places to the east or south of Keith shall be exchanged at Keith."

By the Great North of Scotland Railway Act 1884 it was provided that traffic over the lines of the two companies might be exchanged at any junction.

After the passing of this Act the Great North of Scotland Railway Company began to exchange traffic from places east and south of Keith at Elgin, carrying it from Keith to Elgin by their own line *via* Craigellachie, instead of sending it by the Highland Company's route from Keith to Elgin *via* Mulben, which is nine miles shorter than the route *via* Craigellachie.

The Highland Railway Company appealed to the proviso in section 82 of their Act of 1865, which is quoted above. The Great North of Scotland Railway Company denied that this proviso controlled the Act of 1884, and as the companies could not agree as to the footing on which through rates should be divided, they agreed on 18th June 1886 to refer the following questions to Mr James Beale as arbiter:—"(1) Whether the proviso to section 82 of the Highland Act 1865, above quoted,