

trains. The latter is the view which the Lord Ordinary has taken, and it appears to me sufficient for the decision of this case. But it is plain in construing an expression of this kind that, apart from some special category or description suggested by the context, the word "ordinary" is a word of very vague and indeterminate meaning, and I should have difficulty in knowing what was intended to be excluded by the word "ordinary train" in the absence of expressions in the agreement, pointing out trains of some extraordinary or special class. And therefore I should be disposed also to adopt the argument to the effect that in a line of this description every train which appears in the company's time-tables, and is one that is run daily for the conveyance of passengers, is to be called an ordinary train. The exclusion would then apply to special trains or excursion trains, or trains indeed of any description other than those that are advertised and that are regularly run. It may very well be that under other agreements between railway companies and owners of land adjacent, a different principle of construction might be applied, and it may be an element of importance that the station is on a main thoroughfare, on which trains have been run at express speed, conveying passengers without stopping from one terminus to another. But there is nothing here either in the local situation or character of the line or in the context of the agreement which to my mind suggests a use of the word "ordinary" as meaning the exclusion of any trains such as run regularly for the convenience of passengers.

LORD KINNEAR—I agree with your Lordship. I am not prepared to define exhaustively all the kind or kinds of trains which would be excluded from the operation of the contract as being extraordinary. I think it sufficient for the judgment to say that I agree with the Lord Ordinary that the trains in question have not been shown to us to be other than ordinary trains, and that as they do not belong to any other category they must necessarily fall under the clause in question.

The Court adhered.

Counsel for the Pursuer—A. Jameson—C. N. Johnston. Agents—Macpherson & Mackay, W.S.

Counsel for the Defenders—Dickson—Deas. Agent—James Watson, S.S.C.

Saturday, May 19.

FIRST DIVISION.

WELSH v. RUSSELL.

(*Supra*, p. 611.)

Process—Expenses—Proof—Part or Branch of Case—Act of Sederunt of 15th July 1876.

A party having been found entitled to expenses, objection was taken to the Auditor's report on the ground that he ought in taxing the account to have disallowed the expense of the proof in the case. The Court *repelled* the objection, *holding* that the question whether the expense of the proof should have been disallowed was one for the Court and not the Auditor to decide.

In this case the First Division dismissed the action as incompetent, and found the defender entitled to expenses. The pursuer now objected to the Auditor's report on the ground that he ought to have disallowed the whole expense of the proof, in the exercise of the power given him by the regulations contained in the Act of Sederunt of 15th July 1876.

The fifth of the general regulations as to the taxation of accounts contained in that Act provides as follows—"Notwithstanding that a party shall be found entitled to expenses generally, yet if on the taxation of the account it shall appear that there is any particular part or branch of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he shall not be allowed the expense of such parts or branches of the proceedings."

It was argued for the pursuer that the necessity for a proof had been caused by the nature of the defence stated, and that as the proof had turned out to be unnecessary the Auditor should have disallowed the whole expense of it.

The defender argued, *inter alia*—The regulation referred to did not enable the Auditor to disallow a party found entitled to expenses the expense of the proof. The question whether that expense should be disallowed was for the Court not the Auditor, and it was too late to raise it now.

At advising—

LORD ADAM—The objection taken to the Auditor's report appears to me not to raise a question for the decision of the Auditor at all. I do not think the meaning of the regulation is that the Auditor should decide whether or not particular pleas should have been stated. That is not a branch of the case at all.

LORD M'LAREN—I agree that the Act of Sederunt does not entitle the Auditor to disallow the whole expense of the proof, but only of a particular branch. If it was desired that the whole should be dis-

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 Tenable 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 tenable 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 untenable 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 tenable 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 tenable 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