solutely, applicable to it also. The clause, the interpretation of which was settled in the later case, provided that "the whole fodder was to be used upon the ground, and none sold or carried away at any time, hay only excepted." Here, again, there are at least two things by which this clause is differenced from that with which we have to do. In the first place, there are the words "at any time," the materiality of which has been already shown; and, in the next place, the provision relative to hay, in place of showing that the last year was to be exceptional, shows that the obligation and the rights of the tenant were to be the same as regards all kinds of fodder in the last year as in all the other years of the tack. Furthermore, what was provided was, not as here that the tenant himself should consume, but only that the whole fodder was to be used on the ground. In these circumstances I have come to the conclusion that by neither decision is the present question foreclosed. The Lord Ordinary also refers in his note to the case of *Greig* v. *Mackay*, July 20, 1869, 7 Macph. 1109, for the sake of the *dictum* of Lord Cowan that "the difference in the form of words is immaterial," which, of course, is true, when the words in both cases are all of the same value; but it cannot be said to be true—indeed the contrary is the truth—where the words of one clause are different in their import from those which occur in another contract. Besides, the *dictum* is obviously inappropriate where there is not only a difference in the words used, but there is the omission from one clause of a provision which occurs in and is material to the sense of the other. Had it been the case, as the Lord Ordinary assumes, that the only distinction betwixt the provision in this case and that in *Gordon* v. *Robertson* was that in the latter the word "spend," and in the former the word "consume" is used, Lord Cowan's *dictum*, if authority was required for so plain a proposition, might appositely have been cited for the purpose of showing that such a difference in the expression of the thing is immaterial. But the Lord Ordinary, and presumably from what he says the parties also, overlooked the consideration that the difference between the clauses is not dependent on the substitution of "consume" for "spent," but in the broad fact that the obligation constituted by the one is in several respects essentially different both in the words used and in words omitted from that which is constituted by the other. On the whole matter I am of opinion that our judgment is not foreclosed by previous decisions, and that we should find in favour of the defender's right to carry away the straw of his waygoing crop, the restriction relied on by the pursuer having, according to the sound construction of the clause, no application to the last year of his tack.

Lord Young—I am of the same opinion, and can express my view of the case in a single sentence. There are two questions raised, first, Whether this case is ruled by the decision in the House of Lords in the case of *Gordon* v. *Robertson*? The Lord Ordinary thinks it is, and if his view is sound, then it is conclusive of the matter. His Lordship states the distinction between the two cases in two lines of his interlocutor, and his opinion is that the distinction is not real. I agree with Lord Craighill that there is a distinction between the two cases. In the one case it was provided that the straw should be "spent" on the farm. Here the tenant binds himself to consume the straw on the ground. I think the cases are not the same, and indeed it was pointed out by the Lord Chancellor that a case like the present was not necessarily ruled thereby. Agreeing, then, with Lord Craighill that this case is not ruled by the case of *Gordon*, I come to consider the second question, What is the law to be applied to the case? I am of opinion that when a tenant binds himself to consume the straw on his farm, he does not bind himself when he ceases to be tenant to leave any straw to be consumed by another. Therefore, in the first place, I am of opinion that this case is not ruled by the decision in the House of Lords, and, in the second place, on the merits of the case, that the defender is entitled to prevail, the obligation he undertook not including that which the pursuer, his landlord, seeks to enforce against him.

Lord Justice-Clerk—I concur in the elaborate exposition of the law given by Lord Craighill, and Lord Young's summary of it.

Lord Rutherfurd Clark concurred.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the reclaiming-note for the defender against Lord Kinnear's interlocutor of 26th July last, Recal the said interlocutor; assoilzie the defender from the conclusions of the summons; find the defender entitled to expenses; remit," &c.

Counsel for Pursuers—J. P. B. Robertson—— Pearson. Agents — Thomson, Dickson, & Shaw, W.S.

Counsel for Defender—Trayner—A. J. Young. Agents—Romanes & Simson, W.S.

Saturday, February 2.

FIRST DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

MITCHELL *v.* URQUHART.

Process—Proof—Judicature Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 40—*Appeal—Jury Trial.*

Where an action raised in the Sheriff Court for a sum which exceeds £40 is appealed for jury trial at the proper stage, the party so appealing is, if the case be in itself of a nature suited for jury trial, entitled to have it submitted to a jury.

By the Judicature Act 1825 (6 Geo. IV. cap. 130), section 40, it is, *inter alia*, "expressly provided and declared, that in all cases originating in the inferior courts, in which the claim is in amount above forty pounds, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior court (unless it be an interlocutor allowing a proof to lie *in retentis*, or granting diligence for the recovery and production of papers), it shall be competent to either

of the parties, or who may conceive that the case ought to be tried by jury, to remove the process into the Court of Session." . . . .

James Mitchell, farmer, Headyton, in the county of Banff, was owner of the entire horse "Just-in-Time," which he hired to William Urquhart, residing at Longmanhill, also in the county of Banff, for the season of 1883. The hire for the horse was £35, and the season was to last from the beginning of April till the middle of July. Urquhart took possession of the horse about the end of March 1883, and retained the custody till its death on or about the 22d day of May following.

Mitchell raised the present action in the Sheriff Court of Banffshire against Urquhart to recover a sum of £60 as the value of the horse. He averred that the horse had become ill about 16th May, and had not been properly attended to, and that its death was the consequence of the defender's negligent and improper treatment of it, and he further averred that he received no intimation of the illness or death of the horse, and that its carcase was disposed of without his consent.

The defender gave a general denial of these statements, and averred that the horse was never sound, and that it died from natural causes, and not from neglect on his part.

The Sheriff-Substitute (SCOTT-MONCRIEFF) on 12th December 1883 pronounced an interlocutor allowing both parties a proof of their averments.

The defender appealed to the Court of Session for jury trial, and argued — Under section 40 of the Judicature Act 1825 he was entitled to have the case tried by jury. That Act had fixed the amount entitling a party to jury trial as at £40; here the sum at issue was £60. It devolved upon the respondent to show that the case was not suited for jury trial.

Argued for pursuer—There was no rule that in no circumstances could the Court remit the case to the Sheriff, and in an action for a sum comparatively small a jury trial would be far too expensive. The matter was one for the discretion of the Court, and there was nothing in the Judicature Act to bar the Court from exercising that discretion. The Court would take the whole circumstances into account in disposing of the question, and not consider merely whether or not there was issueable matter.

After consultation with the Judges of the Second Division,

LORD PRESIDENT—We are of opinion, after consulting with the other Judges, that the case being in its nature one appropriate for jury trial, and the sum at issue being above the limit fixed by the statute, there is no reason why the party appealing should not have the case so tried.

LORDS MURE and SHAND concurred.

LORD DEAS was absent.

Counsel for Pursuer—Comrie Thomson. Agent—Alexander Morison, S.S.C.

Counsel for Defender—Watt. Agent—Andrew Urquhart, S.S.C.

Saturday, February 2.

FIRST DIVISION.

[Lord Fraser, Ordinary.

BLAIR *v.* MACFIE.

Process — Jury Trial — Proof — Declarator of Right-of-Way.

In an action by a member of the public for declarator that the public had a right-of-way over four roads leading through the defender's lands, the Lord Ordinary ordered issues for a trial of the cause by jury. The Court, on the ground (1) that the action involved difficult legal questions, and (2) that it appeared that there was considerable public feeling with regard to the subject of it, and that the pursuer had, by the publication of a correspondence in newspapers and otherwise, contributed to increase this feeling, *appointed* the cause to be tried by proof before the Lord Ordinary.

In this action of declarator and interdict John Blair, Writer to the Signet, Edinburgh, sought to have it found and declared that there existed three different public rights-of-way by foot and horse, and one right of footpath, through the lands of Dreghorn, the property of the defender Robert Andrew Macfie, and that the defender should be interdicted from molesting or obstructing the pursuer and all others in the peaceable use and enjoyment of the said roads in all time coming.

The rights-of-way in question were alleged to be (1) a road from Hunter's Tryst, on the public road from Fairmilehead to Colinton through the defender's lands westwards, and then southwards by the glen of the Howdean Burn, on to the defender's march, where it formed two branches which passed through the lands of two different proprietors, neither of whom denied the existence of a right-of-way, and so joined a public road from Edinburgh to Biggar. The second alleged right-of-way began at Colinton, and passing through the defender's lands joined the first. The third (the footpath) led from a different point on the public road, and joined the first; and the fourth led through defender's lands from Hunter's Tryst to Colinton.

The pursuer averred that for more than forty years the right-of-way first described had been used by the public as a foot and horse path from Hunter's Tryst through the Pentland Hills to the valley of the Logan Water and to the Biggar Road; that from the time when the pursuer acquired the estate of Dreghorn in 1862 to 1881 no obstruction had been put in the way of the public using this road, but from this latter date various locked gates, it was alleged, had been erected, with intimations to the effect that there was no road that way. Similar averments were made as to the other rights-of-way to which the action related.

The defender denied that the roads in question were public rights-of-way, and averred that the Logan Water valley could be reached by more convenient and direct roads than that from Hunter's Tryst. As to the other roads, they were private estate roads upon which no public money was expended, and as to one of them,