stair. The said accident was due to said negligence, and defender is liable in damages to the pursuer for the negligence of his servant in the course of his duties. . . ."

The Sheriff-Substitute (BOYD) having allowed a proof, the pursuer appealed for jury trial.

The respondent objected to the relevancy, and argued—The pursuer by staying on in knowledge of the dangerous condition of the stair had lost any remedy that she might have had. That was the result of the authorities (cited *infra*). It might be a question what length of time was sufficient to infer loss of remedy, but in any case there had been sufficient time here, where the danger was said to be both obvious and imminent. In *Hall* v. *Hubner* (*cit. infra*) the danger was not imminent, and therefore inquiry was allowed. The pursuer therefore not only was "*sciens*" but also "*volens*," and the action should accordingly be dismissed. The following cases were cited:—*M'Martin* v. *Hannay*, January 24, 1872, 10 Macph. 411, 9 S.L.R. 239; *Webster* v. *Brown*, May 12, 1892, 19 R. 765, 29 S.L.R. 631; *Russell* v. *Macknight*, November 7, 1896, 24 R. 118, 34 S.L.R. 73; *Shields* v. *Dalziel*, May 14, 1897, 24 R. 849, 34 S.L.R. 635; *Hall* v. *Hubner*, May 29, 1897, 24 R. 875, 34 S.L.R. 653; *Smith* v. *School Board of Maryculter*, October 20, 1898, 1 F. 5, 36 S.L.R. 8; *M'Manus* v. *Armour*, July 16, 1901, 3 F. 1078, 38 S.L.R. 791; *Mechan* v. *Watson*, November 3, 1906, 44 S.L.R. 28.

Argued for appellant—It was a question of fact whether a tenant who stayed on in knowledge of such a defect was *volens*. The fact that he was *sciens* was not enough to infer loss of remedy—*Smith* v. *Baker*, [1891] A.C. 325. That being so, the facts must be inquired into. The pursuer's averments were relevant. The question was whether the pursuer had taken the risk or not—*Russell* v. *Macknight* (*cit. supra*). The pursuer had stayed on in reliance of the landlord's promise through his factor to repair the subjects, and could not therefore be held to have taken the risk of injury.

LORD PRESIDENT—The question in this case is whether the pursuer has set forth relevant averments to go to a jury. I do not think that there is much doubt that she has, and the only reason why there is any nicety in the case is that there are many cases in the books dealing with this kind of subject, and it is difficult not to give dicta which seem not at one with things said in other cases. I have no doubt of the relevancy of averments at the instance of a tenant that there has been fault on the part of the landlord—and it may be fault on the part of the landlord if the premises are in a dangerous condition.

There may, however, be a good defence of *volenti non fit injuria*. The tenant may be *volens*, in the sense that he has taken, or continues to occupy, the premises in a dangerous condition. That would be a good defence. But when it is alleged, as it is in this case, that the tenant had pointed out the defect to the landlord, and that the landlord had promised to repair it, and that it was relying on this promise that the tenant continued to occupy the premises, it is impossible to say that the tenant was, on his own admission, *volens*. No doubt the tenant might stay on so long as to become *volens*, but that is a question depending on the facts as proved at the trial. The record here has the essential averments that the accident was due to the defective condition of the stair; that that was brought to the landlord's knowledge through his factor; that the factor promised to repair the defect, and that the promise was unfulfilled. I say no more, as the true meaning of the facts depends on the exact facts that are proved at the trial.

Mr Hamilton has undertaken to amend his record by putting on an averment as to the exact terms of the tenancy.

LORD KINNEAR and LORD PEARSON concurred.

LORD M'LAREN was absent.

The Court allowed an issue.

Counsel for Pursuer and Appellant—Watt, K.C.—A. M. Hamilton. Agents—Gardiner & Macfie, S.S.C.

Counsel for Defender and Respondent—Constable. Agents—Simpson & Marwick, W.S.

Saturday, December 8.

SECOND DIVISION.

[Sheriff Court at Dunfermline.

BROWN *v.* THE LOCHGELLY IRON AND COAL COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 2, *sub-sec.* 1—*Notice of Accident—Want of Notice — "Mistake or Other Reasonable Cause."*

The pursuer on 20th November 1905, while in the course of his employment with the defenders, racked the muscles of his side. Although recommended by his doctor to rest he continued at work till 6th February 1906, when owing to the accident he was compelled to stop working, and remained disabled for work until 7th May. He gave notice of the accident to the defenders on 14th February, the reason for the delay in giving notice being that he honestly believed that his injury would not keep him from working.

In an arbitration under the Workmen's Compensation Act 1897, in which the pursuer claimed compensation for the period from 6th February to 7th May, *held* that the delay in giving notice of the accident was occasioned by "mistake or other reasonable cause" within the meaning of section 2, sub-section 1, of the Act,

and that therefore the pursuer was not barred from claiming compensation.

Rankine v. *Alloa Coal Company, Limited*, February 16, 1904, 6 F. 375, 41 S.L.R. 306, *followed.*

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 2, sub-section 1, provides—"Proceedings for the recovery under this Act for compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or in case of death within six months from the time of death: Provided always that the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause."

This was a case stated for appeal by the Sheriff-Substitute of Fife and Kinross (HAY SHENNAN) at Dunfermline in an arbitration under the Workmen's Compensation Act 1897 between George Brown, miner, and the Lochgelly Iron and Coal Company, Limited.

In the stated case the Sheriff-Substitute set forth the facts as follows:—"(1) On 20th November 1905, and for some months before, pursuer was in the defenders' employment as a brusher, in their Dora Pit, Cowdenbeath, the pursuer being a "workman," the defenders the "undertakers," and the said pit a "mine," within the meaning of the Workmen's Compensation Act 1897.

"(2) On that date, while pursuer was helping to push a hutch, his foot slipped, and he fell and racked the muscles on his left side and over his lower ribs. He continued at work, but three days later consulted Dr Selkirk, who recommended him to rest. Pursuer, however, continued at his work thinking the pain would disappear, but after working regularly during January 1906 he had to stop work on 6th February. Dr Selkirk had attended him continuously since the accident, and on 10th February sent him to Edinburgh Royal Infirmary. Pursuer recovered sufficiently to be able to return to work at full wages on 7th May 1906.

"(3) Pursuer's inability for work between 6th February and 7th May 1906 was due to the accident of 20th November 1905, and that accident arose out of and in the course of his employment.

"(4) Pursuer designedly did not give notice of his accident at the time, believing that his injuries would not keep him from work. The pursuer was labouring under 'honest innocent mistake' in so believing. After his visit to the Royal Infirmary on 10th February he realised that his injuries were more serious than he had thought, and he dispatched formal written notice of the accident to defenders on 14th February 1906.

"(5) There is no satisfactory evidence on either side to show whether or not the defenders suffered prejudice by the delay in giving notice of the accident.

. . . .

"On these facts the Sheriff-Substitute found in law (1) that whether defenders were prejudiced or not by the delay in giving notice, such delay was due to reasonable mistake on the part of the pursuer; . . . ."

The questions of law for the opinion of the Court were, *inter alia* — "(1) Does pursuer's failure to prove that defenders were not prejudiced by his delay of three months in giving them notice of said alleged accident debar him from claiming compensation? (2) Was pursuer's failure to recognise the serious nature of his injury a 'mistake or other reasonable cause' for designedly withholding notice of accident from defenders within the meaning of section 2 of said Act."

Argued for the appellants—(1) On the first question, the workman was barred from claiming compensation if there was delay in giving notice of the accident unless it was proved that the employer was not prejudiced through the delay, and the onus of proving this lay on the workman—*Shearer* v. *Miller & Sons*, November 17, 1899, 2 F. 114, 37 S.L.R. 80. In this case the onus was not discharged, and accordingly the claim for compensation did not lie. (2) On the second question, it was proved in this case that the pursuer delayed giving notice intentionally, and had continued to work although advised by his doctor to rest. The proviso in the second section of the Act applied to cases where the notice was defective in character, *e.g.*, where it was verbal and not formal, but did not extend to cases such as the present, where notice was designedly withheld. The workman was bound to give notice as soon as practicable, and if there was delay in doing so, the question whether that delay was occasioned by mistake or reasonable cause fell to be determined on the facts of the case, and could not depend on the motive which influenced the workman in failing to comply with the statutory requirement. The "subjective standard" was no more applicable in this question than in the question as to what misconduct was "serious and wilful"—*Dobson* v. *United Collieries, Limited*, December 16, 1905, 8 F. 241, 43 S.L.R. 260. The words "mistake or other reasonable cause" were construed in *Rankine* v. *Alloa Coal Company, Limited*, February 16, 1904, 6 F. 375, 41 S.L.R. 306, but that case was distinguishable in that there the injured workman suffered at the time of the accident only from faintness and weakness and might therefore be excused for failing to appreciate the nature of his injury, whereas in the present case the pursuer felt physical pain and must have realised that he had suffered a serious injury.

Counsel for the respondent were not called on.

LORD JUSTICE-CLERK—I cannot see any ground for interfering with the decision of the Sheriff. The words of the Act are vague. It says that the want of notice "shall not be a bar to the maintenance of proceedings" if it is "occasioned by mistake or other reasonable cause." But that phrase has been the subject of decision in the case of *Rankine* (6 F. 375), which seems to me to be exactly in point. I have therefore no doubt that there was here reasonable cause for the want of notice.

I cannot help saying it is rather unfortunate that the clause has been so framed, for one can figure cases in which, under the clause, serious prejudice to the master might possibly arise; and therefore every case must be dealt with on its own circumstances. I can conceive of a case in which serious injury had been caused by neglect of doctor's orders, and however plucky—and in a certain sense praiseworthy—on the part of a workman it might be to continue at work in spite of his doctor's directions, in such circumstances there might not be reasonable cause for failing to give notice. But here there is no ground in the circumstances for thinking that this was not a case of "mistake or other reasonable cause."

LORD KYLLACHY, LORD STORMONTH DARLING, and LORD LOW concurred.

The Court answered the second question in the affirmative and found it unnecessary to answer the first question.

Counsel for Claimant and Respondent—G. Watt, K.C.—Munro. Agent—D. R. Tullo, S.S.C.

Counsel for Respondents and Appellants—Hunter, K.C.—R. S. Horne. Agents—W. & J. Burness, W.S.

Friday, December 14.

FIRST DIVISION.

[Lord Dundas, Ordinary.

M'DONALD *v.* M'LACHLAN.

Reparation—Slander—Relevancy—Innuendo—Master and Servant—Statement by Master after Pleading Guilty to an Offence, that Servant in Charge had not Informed Him of the Fact the Not-Reporting of which Constituted Offence—Qualified Privilege.

A farmer, after pleading guilty to a charge of not reporting cases of sheep-scab under the Diseases of Animals Act 1894, tendered a written statement to the Sheriff, which stated—"I left the management of my sheep stock entirely in the hands of my shepherd, who did not inform me that there were any signs of scab amongst them." This was read aloud and commented on by the Sheriff, and reports of the proceedings appeared in the local newspapers.

In an action to recover damages for slander raised by the shepherd against the farmer, on the ground that the statement falsely, calumniously, and maliciously represented "the pursuer to be a person neglectful of his duties, and unfit and incompetent as a shepherd," *held* (*rev.* Lord Dundas, Ordinary) that the statement would not support the innuendo, and action *dismissed.*

Opinion, per Lord Ordinary (Dundas), who allowed an issue, that the occasion of the statement was one of privilege, not absolute but qualified, requiring malice to be relevantly averred on record.

On May 29, 1906, James M'Donald, shepherd, Lochgoilhead, brought an action against Neil M'Lachlan, farmer, Knock, Lochgair, Lochgilphead, in which he sought to recover £250 as solatium and damages for slander.

The defender had been charged in the Sheriff Court at Lochgilphead with failure to report two cases of sheep-scab amongst his sheep, an offence under the Diseases of Animals Act 1894 and the Sheep-Scab Order 1905, and had, when pleading guilty, handed a written statement to the Sheriff, who read it aloud and commented on it. The statement was as follows—

"*Knock Farm.*

"Dear Sir,—In pleading guilty to the charge of sheep-scab as found on two hoggs, I may explain that I left the management of my sheep stock entirely in the hands of my shepherd, who did not inform me that there were any signs of scab amongst them. The stock was dipped in the usual way in November, and at that time there was not the slightest signs of scab or any other disease among them. It was with very great surprise I learned in February that two hoggs were affected with scab.

"I may say that I am tenant of Knock Farm for the last twenty-two years, and this is the first time there has been any complaint made against me.

"NEIL M'LACHLAN."

The pursuer, who had been in the defender's service as his only shepherd, averred that the statement was false; that the outbreak had been reported to the defender on 4th December 1905, when he had himself inspected the sheep and satisfied himself of the fact; that in January 1906 the defender had assisted in dipping some sheep which were affected; and that, in addition, the defender had been informed by two adjoining farmers whose names were given. "(Cond. 4) The foresaid statement made by the defender to the Sheriff was of and concerning the pursuer. It was not only false but was calumnious, inasmuch as it charged the pursuer with failure to report to the defender the outbreak of scab, thereby branding the pursuer with neglect of his duties, and with unfitness and incompetence as a shepherd. Further, the said statement was made maliciously and without probable cause. It was known to the