is not how it strikes my mind, because what I understand by "practical sympathy" is, that sympathy with the pursuits of science must be evidenced by some patent and tangible act. Thus, if a man had contributed money to a fund raised for the purpose of enabling some particular scientific inquiry to be carried out, or if he had set up a laboratory and thereby devoted time and means to the object of solving some problem in chemistry, in both cases sympathy with these particular pursuits of science would be shown to be of a very practical nature.

No doubt it might often be very difficult to say whether the act upon which a claimant relied did, or did not, amount to evidence of "practical sympathy," and I recognise that the same kind of difficulty may arise in regard to every term in the description. But the trustees would not be bound to spend all the funds under their control. On the contrary, they would not be entitled to spend one penny unless they were satisfied that the object of the expenditure might reasonably and without unduly straining the language used, be regarded as falling within the description given by the testator.

It may be that the trustees will find that there are but few persons falling within the testator's description with sufficient certainty to justify a recognition of their claims as falling within the scope of the trust, and the result may be that only a comparatively small part of the large fund in the hands of the trustees will be required to carry out the testator's wishes. In such an event, or if, for some other unforeseen reason, the carrying out of the trust should be found to be impracticable, it would be open to the trustees, or to those who would have right to the fund in the event of the trust purposes failing, to bring the matter again before the Court. But in the meantime I am of opinion, for the reasons which I have given, that the trust must be allowed to go on. I therefore think that the interlocutor of the Lord Ordinary should be recalled, and that the trustees should be ranked and preferred in terms of their claim.

The Court pronounced this interlocutor—

"Find on a sound construction of the trust-disposition and settlement of the late . . . that his bequest of residue contained in the fourth purpose thereof is not void from uncertainty: Therefore repel the claim of . . . the next-of-kin . . . sustain the claim of . . . the trustees. . . ."

Counsel for Reclaimers—Dean of Faculty (Campbell, K.C.)—Cullen, K.C.—Gillon. Agents—J. & J. Turnbull, W.S.

Counsel for Respondents—M'Lennan, K.C.—C. D. Murray. Agents—Murray Lawson & Darling, S.S.C.

Saturday, December 8.

FIRST DIVISION.

[Sheriff Court at Glasgow.

GRANT *v.* M'CLAFFERTY.

Reparation—Landlord and Tenant—Negligence—Defective Stair—Promise to Repair—Volenti non fit injuria—Relevancy.

A sustained injury by falling down the common stair leading to the house of which her husband had been tenant for about four years under a yearly tenancy. In an action of damages against the owner of the house, she averred that the accident, which occurred on 5th July, was due to the defective and dangerous condition of the stair, which had deteriorated since the commencement of the tenancy, and was badly lit and very dark; that in the end of May her husband had complained to the defender's factor of the dangerous state of the stair; that the factor had then promised to repair it; and that relying on the factor's promise to do so they had stayed on.

Held that the pursuer's averments were relevant, and an issue *allowed.*

Elizabeth Grant, wife of and residing with Robert Grant, 248 Paisley Road, Glasgow, raised an action of damages for personal injury against John M'Clafferty, the proprietor of the house in which she and her husband resided, and of which her husband was tenant under a yearly tenancy.

The pursuer averred—(The words printed in italics were added by way of amendment in the Inner House)—"(Cond. 1) Pursuer resides with her husband at 248 Paisley Road, Glasgow, in a house of which defender is the proprietor. *The pursuer's husband has been tenant of the said house for about four years. The tenancy is a yearly one, and under it the rent is payable quarterly.* It is on the second storey, and is approached by a close and a common stone stair. (Cond. 2) On 5th July 1905 while pursuer was descending said stair she fell and sustained a fracture of her leg. Said accident was brought about by the defective condition of the stair, one of the steps of which was broken and greatly worn away at the point where pursuer fell, and in a dangerous condition, the stair being badly lit and very dark. Since the date of pursuer's entry to said house (about four years ago) said stair has much deteriorated. (Cond. 3) Pursuer's husband had previously complained to the defender's factor at or about the end of May 1905, in the said house, of the defective and dangerous condition of the said stair, and he had then promised to repair it. Relying upon this promise pursuer remained on in her house, but the defender failed to fulfil his promise and left the stair in its defective and dangerous condition until the accident occurred to pursuer. Defender's factor was negligent in failing to repair said

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,