which she showed her intention that the will should receive effect in its terms.

The Court answered the question in the affirmative.

Counsel for First and Second Parties—W. Campbell. Agents—J. & A. F. Adam, W.S.

Counsel for Third and Fourth Parties—Shaw—Guthrie. Agents—Cair M'Intosh, & Martin, W.S.

Saturday, October 22.

SECOND DIVISION.

[Sheriff of the Lothians and Peebles.

TRAIL AND OTHERS *v.* WILLIAM KELMAN & COMPANY.

Reparation—Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *secs.* 4 *and* 7—*Notice—"Reasonable Excuse" for Want of Notice—Discretion of Court.*

The 4th section of the Employers Liability Act 1880 provides that an action for compensation for injury shall not be maintainable under the Act unless notice that injury has been sustained is given, "provided always that in case of death the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for the want of such notice."

Held that the question whether there was a "reasonable excuse" might either be determined at the adjustment of issues, or in the discretion of the Court be postponed for the determination of the judge who subsequently tried the case.

Circumstances in which the Court *postponed* the determination of the question for the decision of the judge who tried the case.

On 3d November 1886 John Trail, a mason, while in the employment of the defenders, who were builders in Edinburgh, received personal injuries owing to the fall of a gable, from which he died. His widow and children raised an action of damages against his employers, which was laid both at common law and under the Employers Liability Act 1880. They gave no notice of the action in terms of the Act, and the defenders, relying on this, pleaded—(1) The pursuers having failed to give notice of claim to the defenders in terms of the Employers Liability Act 1880, are not entitled to maintain the action so far as laid under that Act." The pursuers stated that "the defender William Kelman was present when the said accident occurred, and was informed of the injuries the deceased sustained."

The Sheriff-Substitute (RUTHERFURD) pronounced this interlocutor—"Finds that notice as required by the Employers Liability Act 1880 was not given to the defenders of the death of the late John Trail within six weeks thereafter, and that there was no reasonable excuse for the want of such notice: Therefore sustains the defenders' first plea-in-law, and finds that the action is incompetent in so far as laid upon the said Act:" *Quoad ultra* he allowed the parties a proof of their averments.

"*Note.*—The only explanation given by the pursuers on record (Cond., Art. 4 *ad finem*) of their failure to comply with the requirement of the statute of 1880 with regard to notice is that the defender William Kelman was present when the accident occurred, and was informed of the injuries sustained by the deceased John Trail.

"The Sheriff-Substitute is unable to hold that there is in terms of the fourth section of the Act a 'reasonable excuse' for the want of the notice. It is not alleged that the pursuers were unable from any cause to give the statutory notice to the defenders, and the Sheriff-Substitute thinks that the words 'reasonable excuse' apply only to those cases in which the relatives of the deceased party have been prevented giving notice by force of circumstances. The Sheriff-Substitute has therefore sustained the defenders' first plea-in-law."

The pursuers appealed to the Court of Session for jury-trial, and proposed an issue in which damages were laid both at common law and under the statute. They moved for approval of the issue, and that the case should be remitted to the Lord Ordinary for trial. The respondents objected to the issue under the statute in respect that no notice had been given of the claim in terms of the fourth section of the statute, which enacts—"(4) An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or in case of death within twelve months from the time of death; provided always that in case of death the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice." Here there had been no written notice—*Moyle* v. *Jenkins*, December 6, 1881, L.R., 8 Q.B.D. 116. In fact there had been no notice given at all. This statutory defect could not be cured by the "reasonable excuse" put forward by the appellants, which was merely that one of the defenders had been present when the accident occurred.—*M'Donagh* v. *P. & W. M'Lellan*, June 18, 1886, 13 R. 1000; *M'Govan* v. *Tancred, Arrol, & Co.*, June 26, 1886, 13 R. 1003.

The appellants replied—There was here reasonable excuse for the want of notice within the rational meaning of the statute. The whole purpose of the statute was attained by one of the defenders being present when the accident occurred. But in any case, on a sound construction of the latter part of the 4th section, the question must be determined by the Judge at the trial of the case. The 7th section, too, provided that "a notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading." This section showed that the purpose of the notice was just to give the master an opportunity of investigating the accident and preparing for his defence.

At advising—

LORD JUSTICE-CLERK—It seems to me that under the statute the objection to the notice and the excuse given for want of it is to be determined by the judge who tries the case. I do not see, then, that in the present state of circumstances we can determine these questions.

LORD YOUNG—I should not say that the questions—whether there had been notice given, or whether there was reasonable excuse for its absence—were always to be delayed till the trial. I should rather have thought that if no notice was given, and no reasonable excuse alleged for not giving it, that the intention of the statute was to stop the trial and avoid further expense being incurred. But on the other hand I think it clearly within the discretion of the Court to postpone the determination of such questions if it sees fit in any particular case. Here the only question is as to whether there was reasonable excuse for not having given the formal notice enjoined by the statute. It is admitted by both parties that the case is to go to trial on the facts, and I therefore think it clearly expedient that the questions should be determined by the judge who tries the case. I should imagine that if he sees that the party whose notice is challenged has done all he could by seeing it given, he would probably admit that the excuse for its want was reasonable. That, however, would be for him on the whole merits of the case to decide.

LORD CRAIGHILL—I do not think that we are in a position to decide on these questions. We have not the full information requisite for their decision. It appears to me that it would be more expedient in the meantime to approve of the issue, and the judge who tries the case, if the questions are still insisted in, may decide on them.

LORD RUTHERFURD CLARK—I agree. I think it is within the discretion of the Court to say whether it is proper that the questions should be determined before the case goes to trial. Here the case, it is admitted, is to go to trial, and therefore I think the questions should be left to the judge who tries it.

The Court recalled the interlocutor of the Sheriff-Substitute *hoc statu*, approved of the issue, and remitted to the Lord Ordinary.

Counsel for the Appellants—J. A. Reid—Shaw. Agent—James Skinner, S.S.C.

Counsel for the Respondent—Comrie Thomson. Agents—Fodd, Simpson, & Marwick, W.S.

COURT OF JUSTICIARY.

Wednesday, October 26.

GLASGOW CIRCUIT COURT.

(Before Lord Craighill.)

H. M. ADVOCATE *v.* ANDERSON.

Justiciary Cases—Theft—Relevancy.

A prisoner was charged with theft, in so far as, having been entrusted with the custody of certain articles of furniture, which were placed in a store of which he was tenant, and it having been his duty to keep the articles in safe custody in the store, and not to remove them therefrom, he did appropriate them to his own uses and purposes by removing them for the purpose of selling them, or for the purpose of using them to furnish a house, and did thus steal them. *Held* a relevant charge of theft.

John Anderson was indicted at the Circuit Court at Glasgow on a charge of theft, "in so far as, you having, on a day in May 1887, the particular day being to the prosecutor unknown, been entrusted by Henry Wyatt, hotel proprietor, then and now or lately residing in or near Brunswick Street, Glasgow, and Mary Mitchell or Wyatt, wife of, and then and now or lately residing with the said Henry Wyatt, or one or other of them, with the custody of certain articles, including the articles after libelled, the same being the property of the said Henry Wyatt and Mary Mitchell or Wyatt, or one or other of them, or of George Muir, accountant, Bath Street, Glasgow, trustee on the sequestrated estates of the said Henry Wyatt; and the said articles having been, time above libelled, placed by the said Henry Wyatt and Mary Mitchell or Wyatt, or one or other of them, or by their instructions, in a store in or near Cromwell Lane, off New City Road, Glasgow, of which you were tenant, or which was rented in your name, and you having been entrusted, and it having been your duty to keep said articles in safe custody in said store, and not to remove them therefrom, and you having had facilities and opportunities, as custodier of said articles, to steal the same, or part thereof, from time to time without immediate detection, and availing yourself of said facilities and opportunities you did, on various or one or more occasions between the 30th day of April and 31st day of August 1887, the particular occasions or occasion being to the prosecutor unknown, in or near said store in or near Cromwell Lane aforesaid, or elsewhere in or near Glasgow to the prosecutor unknown, appropriate to your own uses and purposes, by removing the same therefrom to Motherwell for the purpose of selling the same, or for the purpose of using the same to furnish a house there, and did thus, times or time and place above libelled, wickedly and feloniously, steal and theftuously away take" several articles of furniture.

Counsel for the panel objected to the indictment as irrelevant (1) to infer any criminal offence at all, or (2) at all events to infer the crime of theft.

On the first point it was argued that there was no duty of restitution set forth in the charge,