pursuer in February re-took the house on condition that the landlord should execute certain repairs. He does not allege that it occurred to him that the crack was an obvious danger until the defender's assistant came to arrange about the repairs. He did not himself meet the assistant, but his two daughters pointed out the apparently insecure condition of one of the beams. That is his statement as to the time when he first became aware of the dangerous state of the ceiling. But he lived on in the house, although he was afraid that the plaster might fall, until August, when it came down. I think this is not such a case as to make it desirable that we should interfere with the judgment of two Sheriffs in a matter which is very familiar to them.

LORD TRAYNER—I agree with your Lordship in the chair that the pursuer has presented a case for inquiry. I am unable to distinguish this case in principle from that of *Hall*, and I am prepared to follow it, and to hold this action relevant. The Sheriff-Substitute and the Sheriff have dismissed the action upon the authority of the case of *Webster*. I think the case of *Webster* does not apply. The case of *Shield* was very similar to this, but with this distinction, that there was in that case a positive undertaking by the landlord to remedy the defects complained of, while here there is no averment of a positive undertaking by the landlord to do so.

But the pursuer's case may be relevant although he has not averred everything that was averred in the case of *Shield*. The difference between the two cases is this, that in *Shield* the landlord undertook expressly as part of his bargain to repair the defect in the house let—here, if the defender did not expressly undertake such an obligation, the law nevertheless imposed it on him. The obligation, express or implied, is the same, viz., to give a habitable house to the tenant. The pursuer avers that he did not get such a house, and suffered damage in consequence. I therefore agree that proof should be allowed.

LORD MONCREIFF—I agree that there must be inquiry. I think the Sheriffs have thrown out the case upon a misconception of certain decisions, which have been referred to; I am not surprised at this, because certainly the distinctions which have been made in these cases are very fine. But I do not agree with the Sheriffs that the case of *Webster* is in point. The real ground of action is that the house was not habitable in respect that this ceiling was insecure. The defence urged is that which was stated in *Webster*, viz., that the danger was patent to the pursuer. In answer to that defence the pursuer founds upon the assurance given by the defender through his assistant "that it was all right." The whole importance of that is to meet that defence.

I concur in the observations which have been made by Lord Trayner upon the cases cited during the debate. The cases of *Webster* and *M'Manus* were clearly cases of seen danger. The pursuer's averments in the case of *Hall*, that the attention of the defender's factor was drawn to the condition of the ceiling, and that he did nothing to remedy the defect, were not so strong as those stated here, because here the pursuer was led to believe that the ceiling was safe, while in *Hall's* case he remained though he knew of the danger. Those averments were held in *Hall's* case to entitle the pursuer to inquiry, and I think that we should allow proof in this case.

The Court sustained the appeal, recalled the interlocutors appealed against, repelled the first plea-in-law for the defender, and remitted the cause to the Sheriff to allow the parties a proof of their respective averments.

Counsel for the Pursuer and Appellant — M'Clure. Agent — Andrew Gordon, Solicitor.

Counsel for the Defender and Respondent —Guthrie, K.C. — M'Lennan. Agents — Simpson & Marwick, W.S.

Wednesday, December 18.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

MALCOLM *v.* MOORE.

(Reported *ante*, p. 26).

Expenses — Tender — Expenses to Date of Tender — Precognitions Taken before Issue Allowed, and also before Date of Tender

Where in respect of a tender which had been rejected by a pursuer, the pursuer was found entitled to expenses only "to 12th June 1901," being the date of the tender, *held* that such an award included only the expenses properly incurred before that date, and consequently did not include the expense of precognitions taken before the adjustment of issues for the trial of the cause, although they had in fact been taken prior to the date up to which expenses had been allowed.

This was an action of damages for slander at the instance of Thomas Malcolm, compositor, Iona Street, Leith, against William Moore, 7 Balfour Street, Leith.

On 12th June 1901 the defender offered an apology, and tendered the sum of £51 and expenses. The tender and apology were not accepted by the pursuer, and the case was tried before a jury. The jury found for the pursuer and assessed the damages at the sum of £50.

On 25th October the Court, being of opinion that the apology offered was ample, and ought to have been accepted by the pursuer, found "the pursuer entitled to expenses to 12th June 1901" (the date of the tender), and found the defender entitled to expenses subsequent to that date.

The accounts having been remitted to the Auditor for taxation, he disallowed the charges for the precognitions of seventeen witnesses taken upon 7th June, at which date no issue had been allowed and the record had not been closed.

The pursuer objected to the Auditor's report on the ground that he had disallowed these charges.

Argued for the pursuer—There had been a lower tender made which he had legitimately rejected, and in view of it he had been quite right in taking precognitions. An issue had ultimately been adjusted, and accordingly the date of taking the precognitions was immaterial. The interlocutor of the Court distinctly specified expenses "to 12th June," and this was an expense incurred prior to that date.

Argued for the defender—These precognitions had been taken before an order for proof or adjustment of issues, and were therefore not a good charge against the other side. It was the practice of the Auditor to disallow such charges—*Shirer* v. *Dixon*, May 28, 1885, 12 R. 1013, 22 S.L.R. 669; *Church* v. *Caledonian Railway Company*, December 22, 1883, 11 R. 398, 21 S.L.R. 268. The tender should have been accepted when no issue would have been necessary, and the pursuer ought not to profit by his wrongous procedure.

LORD ADAM—This is a case in which a tender for £51 was made on June 12th, and rejected by the pursuer, and the case went to trial. A verdict for £50 was given in the pursuer's favour, and the Court pronounced an interlocutor whereby they found the pursuer entitled to expenses up to 12th June 1901.

The charges which have been struck out by the Auditor are for the precognitions of seventeen witnesses taken upon the 7th June. The principle upon which the Auditor has proceeded is that the parties carrying on a litigation are not entitled to the expenses of any precognition taken before proof has been allowed or issues have been adjusted. These expenses were all incurred before issues were adjusted. Now, it appears to me that where a party tenders a sum of money, together with expenses up to date, that means the legitimate and proper expenses to which the pursuer would be entitled if he succeeded in the action. If that be so, it is clear that these charges cannot be allowed, because they were incurred before the allowance of proof or adjustment of issues, and that the the Auditor was right in disallowing them.

LORD M'LAREN and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court repelled the objection to the Auditor's report.

Counsel for the Pursuer—J. C. Watt—Spens. Agents—Reid & Crow, Solicitors.

Counsel for the Defender—Watt, K.C.—Munro. Agents—Sim & Garden, S.S.C.

Friday, December 20.

SECOND DIVISION.

[Sheriff-Substitute at Edinburgh.

EDINBURGH AND DISTRICT TRAMWAYS COMPANY, LIMITED *v.* MOONEY.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 7—*Factory and Workshop Act* 1878 (41 *and* 42 *Vict. c.* 16), *sec.* 93 (3)—"*Factory*"—*Accident in Car-Shed Adjacent to Repairing Workshop of Tramway Company.*

A car-driver in the employment of a tramway company while oiling his car in the car-sheds, where the cars were kept while not in use, was injured by a travelling platform called a car-traverser, which was worked by a cable driven by a steam-engine in the immediate vicinity of the car-sheds. No other mechanical power was used in the car-sheds, but in the repairing workshop or machine-room, which was divided from the car-sheds by a wall, mechanical power was used for the purpose of repairing any parts of the cars which required repair, such parts being taken to the machine-room for that purpose and thereafter affixed to the cars in the sheds.

In a claim by the car-driver for compensation under the Workmen's Compensation Act 1897, *held* (*diss.* Lord Moncreiff) that the accident in question occurred on, in, or about a "factory" within the meaning of section 93 (3) (*b*) of the Factory and Workshop Act 1878, and section 7 of the Workmen's Compensation Act 1897, and that the Tramway Company were consequently liable in compensation.

This was an appeal in an arbitration under the Workmen's Compensation Act 1897, before the Sheriff-Substitute at Edinburgh (HENDERSON), between the Edinburgh and District Tramways Company, Limited, appellants, and James Mooney, car-driver, claimant and respondent.

The facts proved, as stated by the Sheriff-Substitute, were as follows:—"The respondent James Mooney was in the employment of the Edinburgh and District Tramways Company as a cable car-driver. At about 7 a.m. of 20th March 1901, while Mooney was engaged oiling his car preparatory to its being taken out for the day he was struck by a travelling platform called a car-traverser, and his right leg was so injured between the car-traverser and a side wall that it had eventually to be amputated below the knee, and in consequence he has suffered permanent disablement from his then employment. The place where this accident occurred was in the car-sheds of his employers at Shrubhill, Leith Walk, Edinburgh. These sheds consist of a covered-in building 550 feet long