Friday, November 10.

SECOND DIVISION.

GRIEVE *v.* RUTHERFORD'S TRUSTEES.

Landlord and Tenant—Lease—Mora. *Held* that a tenant who had possessed a farm for ten years on a lease was barred by *mora* from reducing the lease on the ground that he was induced to enter upon it by false representations.

The pursuer Walter Grieve was tenant of the farms of Easter Glensherrup and Whitehill, under a formal agreement executed by him and the late Miss Rutherford of Glendevon on 19th November 1859. The duration of this lease was for fifteen years. The farms were not described in the lease as consisting of any specific number of acres, and were let to the pursuer for a slump rent of £743. The pursuer entered on possession of the farms at Whitsunday 1860, and took over the sheep which were on the farms at a valuation. After having been in possession of the farms for ten years, he raised the present action to reduce the lease, on the ground of essential error, induced by an alleged false representation made by Miss Rutherford in the advertisement of the farms—"that the farms are capable of keeping about 2000 sheep, besides cattle." He averred that he relied on the accuracy of the advertisement, and that the rent he had agreed to pay exceeded the true value by £200 a-year. The summons concluded for reduction of the agreement, and for repayment by the defenders, who are the testamentary trustees of the late Miss Rutherford, of the sum of £7801, 10s., being the whole rents paid by him down to Martinmas 1870, with interest, but under deduction of such sum as might be ascertained to be a reasonable equivalent for the possession of the farms, or otherwise for £4000 in name of damages.

The Lord Ordinary dismissed the action, and added the following note to his interlocutor, which explains the facts of the case and the contentions of the parties:—

"*Note.*—The pursuer is tenant of the farms of Easter Glensherrup and Whitehill, under a formal agreement of let executed by him and the late Miss Rutherford, the proprietrix, on 19th November 1859. The duration of the lease is for fifteen years from and after Whitsunday 1860. The farms are not set forth in the agreement of let as consisting of any specific number of acres, but they are let as a whole to the pursuer for the slump rent of £743, payable by equal portions at Whitsunday and Martinmas. It was stipulated by the agreement of let that the pursuer should take over the stock of sheep on the farms, which were then in the possession of the proprietrix, at a valuation to be fixed by arbiters. The pursuer avers that he entered into possession of the farms at Whitsunday 1860; that the sheep stock, which consisted of 1469 sheep, was then delivered over to him; that it was valued, and that the price was paid in terms of the agreement of let.

"The pursuer, after having been in possession of the farms for more than ten and a-half years, has raised the present action on the ground of essential error induced by a false representation made by Miss Rutherford in the advertisement of the farms—'that the farms are capable of keeping about 2000 sheep, besides cattle.' He avers that in taking the farms, and in agreeing to pay £743 of rent for them, he relied entirely upon the accuracy of this representation in the advertisement—that the farms were not capable of keeping more than 1400 sheep, without any cattle—and that the rent which he has agreed to pay exceeds the true value of the farms by at least £200 a-year. In the summons the pursuer concludes for reduction of the agreement of let, and for repayment to him by the defenders, who are the testamentary trustees of Miss Rutherford, of the sum of £7801, 10s., being the whole rents paid by him down to and including the half-year's rent due at Martinmas 1870, with interest thereon, but under deduction of such sum as may be ascertained to be a reasonable equivalent for the possession of the farms, or otherwise for £4000 in name of damages.

"The Lord Ordinary is of opinion that the pursuer's statements are not relevant or sufficient in law to support the conclusions of his summons, and that on his own statements he is barred by *mora* and acquiescence from insisting in the action. The pursuer avers that the number of sheep delivered to him at Whitsunday 1860, when he entered upon the farms, was only 1469. He further avers (cond. 7) that on finding that there was not at least 2000 sheep upon the farms he became suspicious of the accuracy of the statement in the advertisement regarding the capabilities of the farms, but nevertheless he was desirous, by a short trial of the farms, fairly to test their capabilities; that after so testing them he ascertained that the said statement was incorrect; that the farms were not capable of keeping more than 1400 sheep, without any cattle at all; and that he communicated this to Miss Rutherford. But he does not aver that he took any steps to obtain relief. Neither does he aver that Miss Rutherford recognised in any way his claim for relief, and, as he admits, he continued to pay the rent to her down to the date of her death in 1869. No doubt the pursuer avers that, subsequently to his communication to Miss Rutherford, he made the like communication to her niece Mrs Aytoun, who, he alleges, resided with her and managed her affairs, in consequence of her age and infirmities, she being upwards of ninety years of age, and that Mrs Aytoun did not deny that the farms were not capable of keeping 2000 sheep, and admitted that the rent was too high, but urged the pursuer to continue to pay the rent during Miss Rutherford's life, 'and led the pursuer to understand that upon Miss Rutherford's death the matter of rent would be adjusted with the pursuer.' He also states that, misled by these representations, he continued to pay the rent during Miss Rutherford's life. But he does not aver that Mrs Aytoun had any authority to act for Miss Rutherford in regard to the farms or the rents, and his statements in regard to what Mrs Aytoun led the pursuer to understand are much too loose and vague to account for his taking no steps to obtain relief, for his continuing in the occupation of the farms, and for his payment of rent to Miss Rutherford for nine years after his entry. This occupation of the farms continued, and these payments of rent were made, according to the pursuer's own statement, for years after he had tested the farms, and come to the conclusion that they were not capable of keeping more that 1400 sheep, without any cattle. This constituted acquiescence on the part of the pursuer in the lease, and such acquiescence, extending as it does over such a long period of the lease, is sufficient, the Lord Ordinary considers, to exclude the present action.

"But further, the representation in the adver-

tisement, of which the pursuer complains, is not of any matter of fact, but is merely an expression of opinion. There was no warranty that the farm would keep 2000 sheep besides cattle. Such an expression of opinion made in an advertisement cannot, it is thought, be received as a representation of a matter of fact upon which any intending tenant was entitled to rely, but must be held to be a mere matter of opinion, upon which the intending tenant required to exercise his own judgment. It is stated in the advertisement that 'Mr Robert Elliot, Laighwood, Dunkeld, who has inspected the farms, will answer any inquiries which may be addressed to him.' Supposing that the statement of opinion as to the capability of the farms had been made by Mr Elliot, as representing the proprietrix, to any intending tenant, such statement of opinion, even though coming from a skilled inspector employed by the proprietrix, could not, the Lord Ordinary considers, be held a representation in regard to the farms, upon the accuracy of which an intending offerer was entitled to rely as a qualification of the contract, or as forming any part of it. The statement in the advertisement does not, it is thought, stand in a different position."

The pursuer reclaimed.

FRASER and ASHER for him.

SHAND and KEIR for respondents.

The Court adhered on the grounds stated by the Lord Ordinary in his note.

Agents for Pursuer—Scott, Moncrieff, & Dalgetty, W.S.

Agents for Defenders—Dundas & Wilson, C.S.

Friday, November 10.

STARK *v.* M'LAREN.

Reparation — Accident — Master and Workman — Fault. A workman in a chemical manufactory was employed by his master, under the supervision of a foreman, to clear away the debris of a building, part of which had fallen during the previous day. While thus engaged the rest of the wall fell down and crushed the man beneath it. *Held*, in an action at the instance of the workman, that the master was liable in reparation, in respect that he had not used sufficient caution, or taken proper precautions for the safety of the men employed in his service.

Stark, the appellant, had formerly been in the employment of the respondent, Mr M'Laren, chemical manufacturer, Grahamston, as a blockmiller, and he sued Mr M'Laren in this action for damages for injuries sustained by him resulting from an accident which occurred while he was in the defender's employment.

The nature and circumstances of the accident appear sufficiently from the findings in the Sheriff-Substitute's interlocutor, which is as follows:—

"*Falkirk, 8th March* 1871.—The Sheriff-Substitute having inspected the premises in presence of parties' procurators, and having considered the proof and whole process, finds, in point of fact, that on the 27th February 1870 the roof of the cylinder-house in the defender's chemical works at Grahamston fell in, carrying along with it the greater part of the front wall and the upper part of the west gable: Finds that the defender instructed his son Mr Peter M'Laren, who has the entire management of the operative department of his chemical works in question, to employ the labourers next morning in clearing away the fallen roof and rubbish: Finds that accordingly early on 28th February a number of the workmen were so employed under the direction of Mr Peter M'Laren, and about 9 A.M. of that day the defender came to the works and saw what was going on: Finds that in the course of the forenoon, while some of the workmen were employed inside the cylinder-house, under Peter M'Laren's orders, in unscrewing and removing the rafters of the fallen roof, the pursuer, along with a fellow workman James Taylor, was ordered by the said Peter M'Laren to clear away the bricks and rubbish which had fallen from the west gable, and which were lying at its base outside; and while they were so engaged a considerable portion of the gable fell upon the pursuer, who thereby sustained the serious injuries libelled: Finds that the said gable having been injured by the fall of the roof on the previous day, was in a dangerous condition when the operations above mentioned were commenced on the 28th February: Finds that no sufficient examination was made by the defender, or on his behalf, of the condition of the gable, and no precautions were taken for the security of the pursuer and the other workmen while employed near it: Finds that the pursuer was thus unduly exposed to risk when he met with the accident libelled, and was in no manner to blame for what occurred.

"In these circumstances, finds, in point of law, that the defender, as his employer, is liable in reparation for the injuries sustained by the pursuer; therefore repels the defender's pleas, modifies the damages to the sum of £100 sterling, and decerns against the defender for that amount, under deduction of the sum of £26, which has been paid by the defender to the pursuer since the date of the accident: Finds the defender liable in expenses; allows an account thereof to be given in; and remits the same when lodged to the Auditor of Court for the purpose of being taxed; and decerns.

"*Note.*—The gable, by the fall of which on 28th February the pursuer was injured, must have been greatly shaken by the fall of the roof on the previous day. It had been struck by the iron rafters which projected over its upper surface so severely that a portion of it had been thrown down; and as there was merely the thickness of two bricks (9 inches) above the level of the side walls, it was very improbable that the portion of the gable left standing could have much stability. Farther, the greater part of the front wall had given way, and the whole roof, consisting of iron couples and rafters, with tiles resting upon these, had fallen in such a way that in some places the ends of the couples rested on the ground, but in others they had been intercepted by various erections within the building, and the iron of the roof was consequently bent and twisted. The Sheriff-Substitute thinks that in these circumstances it was highly imprudent on the part of the defender to direct his son Mr Peter M'Laren to undertake the removal of the confused mass of roofing materials within the building, and of the fallen rubbish outside, by the agency of the ordinary labourers of the establishment, and without any inspection of the ruinous premises, or any superintendence by a skilled tradesman. It is of importance also, as regards the responsibility of