that it was the duty of the defenders to see that the hoist was in a safe condition before allowing those using it in connection with their business to do so, that the hoist was not in a proper state of repair, or at all events was not running as it should have been, and that the defenders knew, or ought to have known, or at anyrate could have discovered this if they had made a proper examination of the hoist or inquiries with regard thereto.

Held that the pursuer had stated a relevant case.

Robert Oliphant, carter, Glasgow, brought an action for £1000 against Johnstone & Macleod, stay and corset manufacturers, 72 Clyde Street, Glasgow, in the Sheriff Court of Lanarkshire, at Glasgow.

He averred—"(Cond. 3) At the date of the accident, and for some time prior thereto, the pursuer was in the employment of the Caledonian Railway Company, his duties being to deliver and take delivery of goods for the company. (Cond. 4) On or about 23rd June 1893 he was sent to defenders' place of business to receive certain goods to be taken by him to the company's station at Buchanan Street, Glasgow. (Cond. 5) On arrival at said place of business the pursuer proceeded to the top flat of the building, occupied by the defenders, in order to obtain delivery of the goods which he had been sent for, and in order to reach said top flat he stepped into a hoist used for the conveyance of persons and goods from the ground flat thereto, and which was in charge of an attendant in defenders' employment. (Cond. 6) After obtaining delivery of the goods for which he had been sent, and depositing them in the hoist to be taken to the ground flat, the pursuer stepped into said hoist along with said goods, and the same having been set in motion by the attendant, they began to descend, and went all right until they reached the second flat, when the regulating power seemed to lose its control, and hoist and contents fell to the ground with such terrific speed that on reaching it the pursuer was not only thrown out, but the hoist rebounded to the top flat and remained fixed there. (Cond. 7) In consequence of the rapidity of the descent of said hoist, and the violence with which it came into contact with ground flat, and the manner in which the pursuer was thrown therefrom, he sustained serious injuries. . . . (Cond. 8) It was the duty of the defenders to see that the hoist was in a safe condition before allowing those using it in connection with their business to do so, and this they negligently failed to do. The hoist was not in a proper state of repair, or at all events was not running as it should have been, and this the defenders knew, or ought to have known, or at anyrate could have discovered had they made a proper examination thereof, or inquiries in regard thereto."

The pursuer pleaded—"(1) The pursuer having been injured through the fault of the defenders, as within condescended on, he is entitled to reparation from them therefor."

The defenders pleaded—"(1) The action is irrelevant."

On 15th November 1893 the Sheriff-Substitute (GUTHRIE) pronounced this interlocutor:—"Finds that the pursuer has not stated a relevant case: Therefore dismisses the action, and decerns." . . . "*Note.*—No specific fault of the defenders has been set forth."

The pursuer appealed to the Court of Session, and argued—It was impossible in a case of this sort to aver specific fault, and the pursuer was not bound to do so. It was in the same category as injuries received from a railway accident. The maxim *res ipsa loquitur* applied—*Macaulay* v. *Buist & Company*, December 9, 1846, 9 D., opinion of Lord Fullarton, p. 245; *Fraser* v. *Fraser*, June 6, 1882, 9 R. 896; *Walker* v. *Olsen*, June 15, 1882, 9 R. 946.

Argued for the defenders—The Sheriff-Substitute's judgment was right. The defenders were only tenants of this house. The case was distinguished from those quoted by the pursuer. There was no presumption that the accident was caused by a defect in the machinery for which the master was responsible—*Macfarlane* v. *Thompson*, December 6, 1884, 2 R. 232.

At advising—

LORD JUSTICE-CLERK—I have no doubt that the pursuer's case on record is relevant as it stands, and that he is entitled to an issue.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

LORD YOUNG was absent.

The Court recalled the interlocutor appealed against, and ordered issues to be lodged for the trial of the cause.

Counsel for the Pursuer—A. M. Anderson. Agent—John Veitch.

Counsel for the Defenders—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Tuesday, February 13.

SECOND DIVISION.

[Lord Kyllachy Ordinary.

MORISON *v.* MORISON.

Entail—Aberdeen Act 1824 (5 *Geo. IV. c.* 87) *—Provision to Widow—Increase after Granter's Death.*

The Aberdeen Act 1824 (5 Geo. IV. c. 87), sec. 1, provides—"That an heir of entail in possession may provide for his wife out of the entailed lands a liferent annuity not exceeding one-third of the rent or value of the lands after deducting all other burdens, 'all as the same may happen to be at the death of the granter.'" Sec. 3—If two such liferents subsist on lands at one time, a

third may not be granted to take effect till one of the former shall cease, but the heir may increase a former or grant a new liferent to become due upon the expiry of the subsisting liferents, although the same may not take place in his lifetime.

An heir of entail in possession provided a liferent annuity of £1800 to his wife "subject to all the conditions and limitations" contained in the Act 5 Geo. IV. c. 87, so far as applicable. After his death it was ascertained, in a petition at the instance of his successor, that the proper amount of his widow's annuity was £980.

On the death of a former liferentrix, and the lapse of her annuity, the widow sought declarator that she was entitled to payment of the full amount of the annuity of £1800, or at least one-third of the free rental of the estate.

Held that although the general rule by the 1st section of the statute limited an annuity to one-third of the free rental as at the date of the granter's death, the 3rd section provided by exception that a diminution of the said free rental by a previous widow's annuity should not count against a succeeding annuity, which is to begin to run, or to be increased on the termination of the first, and accordingly that the pursuer was entitled to declarator sued for.

The Entail Amendment (Aberdeen) Act 1824 (5 Geo. IV. c. 87), provides, sec. 1—"That it shall and may be lawful to every heir of entail in possession of an entailed estate under any entail already made or hereafter to be made, to provide and infeft his wife in a liferent provision out of his entailed lands and estates by way of annuity, provided always that such annuity shall not exceed one-third part of the free yearly rent of the said lands and estate where the same shall be let, or of the free yearly value thereof where the same shall not be let, after deducting the public burdens, liferent provisions, and the yearly amount of other burdens of what nature soever affecting and burdening the said lands and estates or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or value thereof to such heir of entail in possession, all as the same may happen to be at the death of the granter." Sec. 3—"Provided always, and be it enacted, that where two liferents to wives or husbands granted under the powers hereinbefore contained shall be subsisting at any one time upon an entailed estate, it shall not be competent to grant a third liferent to take effect till one of the former subsisting liferents shall cease or expire, but the power of liferent may be exercised so as to increase a former liferent, or grant a new liferent to the extent hereinbefore authorised to be granted, upon the ceasing or expiration of any former or subsisting liferent, although the same may not take place in the lifetime of the person granting such prospective or increased liferent." Sec. 7—"Provided always, and be it enacted, that in every case in which the provision granted to a wife or husband under the authority of this Act shall exceed such proportions of the rent or value of any entailed estate as hereinbefore mentioned, such provision shall not be deemed to be null and void, but the same shall be voidable at the instance of the heir of entail next in the order of succession, or of any other heir of entail, to such extent as such provision shall exceed those herein authorised in each respective case to be granted, but no further."

By bond of annuity dated 18th April 1874 and recorded 8th January 1880, Alexander Morison, Esquire of Larghan, Coupar-Angus, and then also heir of entail in possession of the estate of Bognie, under the authority of the Act 5 Geo. IV. c. 87, provided to his wife Mary Catherine Young or Morison in liferent if she survived him a free yearly annuity of £1800 from the said lands, "exempted from all burdens and deductions whatsoever (but subject to restriction always to the extent after specified in the event and during the period after mentioned), to be uplifted and taken at two terms in the year, Whitsunday and Martinmas." After a description of the lands the deed proceeded—"Provided always and declaring that in case I shall predecease Mrs Jessie Duff or Morison, widow of the now deceased Alexander Morison, late of Bognie, the foresaid annuity hereby provided to my said wife shall be restricted to the sum of £900 sterling yearly during the lifetime of the said Mrs Jessie Duff or Morison (and on her death the said full annuity of £1800 shall become payable to my widow), payable at the terms, by the proportions, and with penalty in case of failure and interest during the not-payment in like manner as before provided with reference to the said annuity of £1800; and further declaring that the said annuity (restrictable as aforesaid to the extent, in the event, and and during the period before specified) is provided under all the provisions and limitations contained in the foresaid Act of Parliament in so far as the same are applicable thereto."

Alexander Morison was succeeded in the estate of Bognie by John Morison, who by bond of annuity and provision dated 15th January, and recorded 19th March 1880, and in virtue of the Act 5 Geo. IV. c. 87, and on the narrative that he was desirous of securing a suitable annuity for his widow out of the entailed lands and estate, provided and disponed "to the said Mary Jane Weatherall or Morison, my wife, in liferent during all the days of her life after my decease, in case she shall survive me only, all and whole a free yearly annuity of £1800 sterling, exempted from all burdens and deductions whatsoever, but subject to the conditions and limitations of the foresaid Act of Parliament, to be uplifted and taken at two terms in the year Whitsunday and Martinmas by equal portions. . . . Provided always and declaring that should there be two liferent provisions in favour

of the widows of two former heirs of entail in possession granted under the power contained in the said Act of Parliament subsisting at the same time of my decease, then the liferent provision thereby constituted shall not take effect till one of the former subsisting liferents shall cease or expire; and further declaring that the foresaid liferent annuity hereby granted is provided under all the conditions and limitations contained in the foresaid Act of Parliament in so far as the same are applicable thereto; and particularly declaring that should the foresaid annuity of £1800 be found to exceed one-third of the free yearly rent or value of the said entailed lands and estate as the same shall be ascertained in manner pointed out by the said statute at the date of my death, or such other sum as in the circumstances may be consistent with the terms and provisions of the said statute, then the said annuity so provided to my said wife shall be restricted to a sum corresponding to the one-third of the free yearly rent or value of the said entailed lands and estate ascertained in manner foresaid, or to such other sum as in the circumstances may be consistent with the terms and provisions of the said statute."

John Morison died on 10th November 1886 survived by his widow Mary Weatherall or Morison.

He was succeeded in the estates by his son Frederick Lemare Morison, who on 16th June 1888 presented a petition to the Court of Session to restrict the annuity payable to his father's widow. After certain procedure the Lord Ordinary (KYLLACHY) upon 29th October 1889 pronounced an interlocutor restricting the amount of the widow's annuity to £980 per annum, "but reserves to the said Mrs Mary Weatherall or Morison her claim on the death of Mrs Mary Catherine Young or Morison, widow of the deceased Alexander Morison, to the full annuity of £1800 provided to her by the said bond."

Mrs Mary Catherine Morison died 5th May 1893.

Mrs Mary Jane Weatherall or Morison then raised an action against the heir of entail in possession for declarator that the annuity payable to her out of the lands of Bognie under the bond of annuity in her favour granted by her deceased husband John Morison amounted to the sum of £1800, afterwards restricted by minute to £1500, being one-third of the free rental of the estate.

The defender pleaded—"(2) The pursuer's husband had no power under the statute to increase the liferent to his widow beyond the one-third of the free yearly rent ascertained as at the date of his death, seeing that the liferent could not be, *quoad* the bond granted by him, a 'former' liferent in the sense of the statute. (3) *Esto* that the pursuer's husband had power under the statute to provide an increase of her annuity on the expiry of a former liferent, such power could not take effect unless exercised by him. (4) In any event, the pursuer's husband having, by the terms of the said bond and codicil, irrevocably fixed the determination of the amount of her annuity as at the date of his death, and not having provided for any subsequent increase thereof, and having made delivery of the said deeds, and having had them duly feudalised immediately thereafter, the measure of the pursuer's rights under the said bond falls to be taken finally as at the date of the granter's death."

Upon 24th November 1893 the Lord Ordinary decerned in favour of the pursuer.

"*Opinion.*—In this case I have given every consideration to the argument which was pressed upon me on behalf of the defender, but the result is that I have not been able to find grounds for holding that there is any obstacle, either upon the terms of the statute or upon the language of the bond of provision, to the pursuer making good her claim to the increased annuity which she now seeks.

"So far as the bond is concerned, I cannot doubt that its just construction is that the granter desired to give his widow an annuity of £1800, subject only to such restriction as the statute required. That is, I think, the whole scheme of the deed and the plain meaning of the language. The only question therefore, in my judgment, is whether the statute permits an heir-of-entail to grant to his wife what has been termed an expanding annuity—that is to say, an annuity which shall increase on the free rental as at the date of the death becoming enlarged by the lapse of some previous annuity. Now, of course, if that question depended on the language of the first section of the statute it must be answered in the negative. No annuity could according to that section exceed one-third of the free rental as at the death of the granter. But the point really turns upon the terms of the third section of the statute, and that section, as I read it, makes an express exception from the general rule of the first section, that exception being in effect this, that in so far as the free rental at the death of the granter is diminished by a previous widow's annuity, such diminution shall not count against a succeeding annuity which is to begin to run or to be increased on the termination of the first.

"I am not, I confess, able to find any reasonable interpretation for the third section except what I have just stated. In short, it appears to me that the third section has effectually provided, *inter alia*, for the very case which has occurred here.

"I propose, therefore, to decern and declare in terms of the summons—as restricted—that is to say, for an annuity of £1580, being the amount fixed at the date of the death, plus one-third of £1800, of which the estate has been disburdened by the death of Mrs Morison senior."

The defender reclaimed, and argued—(1) The Lord Ordinary was wrong in holding that the statute acted automatically. In order that the increase could be made there must be a special stipulation to that effect in the deed itself. The amount of the annuity must be calculated as at the husband's death, and could not be increased by anything which happened after that event,

just as the widow could not be prejudiced by anything happening after that date—*Christie* v. *Christie*, December 10, 1878, 6 R. 301. This was merely an empowering statute, and if the granter of the deed did not take advantage of the power given to him it was of no avail. (2) No such power was exercised. The only words, on which the pursuer could found were "under all the conditions and limitations contained in the foresaid Act of Parliament," and they were too vague and indefinite to act as the exercise of the power. The mode in which that could be done was shown by the clause in Alexander Morison's deed. This could not be decided as a question of intention—*Callendar* v. *Callendar*, May 21, 1869, 7 Macph. 777. The case of *Bonar* v. *Anstruther*, June 6, 1868, 6 Macph. 910, did not apply, because in that case the annuity which was applied to increase another and later annuity was not constituted under the Aberdeen Act at all. All such cases as this referring to an entailed estate were strictly construed — *Stewart* v. *Burn Murdoch*, January 27, 1882, 9 R. 458.

The respondent argued—(1) The statute provided by the 1st section that heirs of entail could grant provisions to widows out of the entailed estate of not more than one-third part of the free yearly rental. The third section provided that the annuity could be increased by circumstances happening after the granter's death, and that that was the purpose was shown by the seventh section, which provided that if by such increase the annuity exceeded one-third of the free rental, it could be reduced to that amount by a subsequent heir of entail in possession. The Lord Ordinary was therefore right in his view of the statute. If it was held that the statute had merely an empowering force, the granter of the deed in question had effectually exercised that power by the words in his deed. It did not require such words as were used in Alexander Morison's bond of annuity.

At advising—

LORD YOUNG—This case raises an interesting question, but the Lord Ordinary has apparently decided it without much doubt or difficulty, and I must say that I have much sympathy with the views he has expressed in his note.

I think the plain meaning of the statute was, that if there were two subsisting liferents—by which I mean liferent annuities—in favour of the widows of two previous heirs of entail, then the granting of a third liferent annuity in favour of the widow of another heir of entail should have no effect until one of the prior liferents should have disappeared by the death of the annuitant. Further, I think that the statute intended that a liferent provision to a widow, granted according to the terms of the first clause of the Aberdeen Act, should be calculated with respect to the state of affairs which might exist, not only at the death of the granter of the annuity, but also with reference to the state of affairs which would exist at the expiry of one or both of the prior liferents.

If two prior liferents on the estate are existing, the grant of a third one can have no effect or validity, and it is clear, under section 3 of the statute, that this want of effect and validity ceases on the death of one of the prior liferents, for otherwise the provisions of the statute would come to mean this, that if at any time two liferent annuities happened to be subsisting upon an estate, the grant of a third never could have any effect and validity.

That is not the language of the statute. This is what the Act says—"Provided always that where two liferents to wives and husbands, granted under the powers hereinbefore contained, shall be subsisting at any one time upon an entailed estate, it shall not be competent to grant a third liferent to take effect until one of the former subsisting liferents shall cease or expire." Not that the liferent shall not be granted at all, but that it shall not be granted with effect and validity until the death of one of the prior liferenters, but that then it shall take effect and have validity. The deed granting the liferent is a living deed so far as it applies to the rents of the estate, when the death of one of the prior liferenters leaves only one liferent annuity, charged upon the entailed estate as an annuity under this Act. So also is it a living deed, with reference to the sum provided as the amount of the annuity, although that is greater than one-third of the free rental of the entailed estate. The deed is not to have any effect at all if there are two widows of former heirs of entail drawing annuities from the estate, but if one of the annuitants dies then it is to have effect, so far as relates to one-third of the free rental of the estate, after deducting the annuity paid to the other annuitant and the other deductions ordered by the statute.

I do not think that this is merely an empowering statute, the meaning of which is to put an heir of entail in possession into this position — if he grants a deed, giving a liferent annuity to his widow out of the free rental of the entailed estate, when there are two subsisting liferents, that he shall be empowered to put a clause into the deed which shall have the effect of enabling his widow to draw her annuity from the estate when one of the prior annuitants dies. I think that the meaning of the statute is that the deed granting the third liferent shall have effect and validity upon the death of one or both of the prior annuitants.

The Act then goes on to say—"but the power of liferent may be exercised so as to increase a former liferent or grant a new liferent to the extent hereinbefore authorised, to be granted upon the ceasing or expiration of any former or subsisting liferent, although the same may not take place in the lifetime of the person granting such prospective or increased liferent."

Now, what is the meaning of these words. They have reference solely to the amount

of the annuity to be granted by the deed. The amount "hereinbefore authorised" is a third of the free rental of the entailed estate after deducting the various burdens upon it, and in my opinion the words mean that in estimating the amount that may be given to the new annuitant or the increase granted to a prior annuitant, the amount of the annuities which have expired are not to be taken into account.

I think that is the fair view to take of the meaning of the statute, and the only view which was urged against it was that this provision gave only a power to the granter of the deed to increase the annuity or to grant a new one on the death of the prior annuitant, and that any deed to be effectual must be in terms an exercise of this power, or it must so read that although there are not actually words in the deed stating that it is granted under the powers conferred by the statute, the Court shall come to be of opinion, on consideration of its whole terms, that that was the intention of the granter of the deed. I think that is too technical an argument to overcome the manifest considerations of convenience and good sense which, in my opinion, exist in the statute as I have explained them.

I should like to say I have great difficulty in recognising the case of *Bonar* v. *Anstruther*, June 6, 1868, 6 Macph. 910, as an authority in this case. It appears to me doubtful if the third clause of the statute was applicable at all to that case. That section is only applicable where there are two liferents charged upon the estate which have been granted under the powers conferred by the first clause of the statute. In *Bonar's* case there was only one such. The question which arose on the second branch of that case was whether a prior liferent secured over the estate, but which had not been granted under the powers of the Act 5 Geo. IV. cap. 87, nor indeed under the entail at all, was to be deducted from the free rental of the entailed estate in considering what was the amount which could be calculated on as giving the basis for the liferent annuity to be charged under the statute. The original deed constituting the annuity had been granted by the entailer himself, in the deed of entail, in favour of his own wife. That was certainly a burden to be deducted in calculating the free rental available for granting another annuity under the statute, but it was to be deducted merely as a burden to be taken into account at the date of the death of the granter of the annuity. The deed was not granted either under the statute or under the powers of the entail, and the burden it imposed was not different from any burden which the entailer, as being himself fee-simple proprietor of the lands, might have put upon the lands in the shape of an annuity in favour of any stranger. Therefore how clause 3 of the statute could have anything to do with the matter I fail to see.

Although I am not prepared to regard the decision as an authority, I admit at once that the remarks of the judges upon the meaning and spirit of the Act are valuable and worthy of consideration. With regard to that matter I adopt the view which the Lord Ordinary has taken, and I agree with him that that is the reasonable interpretation of the statute. I think that this is a remedial statute and ought to be liberally construed, so that the granter of the annuity may get the full benefit of the remedy it contains, viz., that when one or both of two prior liferents on an entailed estate cease to be payable, they shall cease to be obstacles to the granting of a liferent annuity by another heir of entail.

LORD RUTHERFURD CLARK—I agree with the Lord Ordinary's opinion and with your Lordship. I do not express any opinion as to the case of *Bonar*.

LORD TRAYNER—The puzzle in this case I think is raised by the peculiar way in which the third clause is expressed, and is a puzzle which may take time and trouble to solve. In my opinion the Lord Ordinary has solved it in a way in accordance with the fair meaning of the statute, and with the purpose which the statute was meant to effectuate.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for the Reclaimer — Graham Murray, Q.C. — Lees. Agents — Auld & Macdonald, W.S.

Counsel for the Respondent—Dundas—Craigie. Agents—Mackenzie & Black, W.S.

Tuesday, February 13.

FIRST DIVISION.

[Sheriff of Inverness.

BAIN *v.* HERITORS OF DUTHIL.

Process—Appeal—Mode of Trial—Judicature Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 40.

The minister of a parish sued the heritors for payment of £1000 as manse maill, alleging that he had been unable to occupy the manse for eight years owing to its uninhabitable condition. The defenders appealed for jury trial under the 40th section of the Judicature Act, but moved the Court to remit the cause to the Lord Ordinary on Teinds, in respect that he had already had cognisance of the matters in dispute between the parties in an appeal under the Ecclesiastical Buildings and Glebes (Scotland) Act 1868. The pursuer moved that the case should be sent back to the Sheriff for a proof.

The Court *remitted* the case to the Sheriff for proof, on the grounds that it was peculiarly fitted for trial before the local tribunal, and that it was desirable to obviate the possibility of an appeal to the House of Lords upon the facts.