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.

This action was raised in the Sheriff Court at Inverness in July 1892 by the Rev. James Bain, minister of Duthil, against the heritors of that parish for payment of £1000 as manse maill.

The pursuer averred that from defective drainage, the proximity of a crowded churchyard, and other causes, the manse of Duthil had not been a fit and habitable residence for him and his family since May 1884, when he ceased to occupy it, and that from that date he had been without a habitable manse through the fault of the defenders.

It appeared from the averments of parties that the pursuer had appealed to the Sheriff of Inverness under the Ecclesiastical Buildings and Glebes (Scotland) Act 1868 (31 and 32 Vict. cap. 96), in order to have the heritors ordained to put him in possession of a habitable manse. The case had subsequently been appealed by the heritors to the Lord Ordinary on Teinds (STORMONTH DARLING) who, after obtaining reports from men of skill, ordained the defenders to execute certain repairs upon Duthil manse. These repairs were not completed at the date when the present action was raised.

On 27th May 1893 the Sheriff-Substitute (BLAIR) allowed parties a proof of their averments, and on appeal, this interlocutor was affirmed by the Sheriff (IVORY).

The defenders then appealed to the First Division under the 40th section of the Judicature Act 1825, and moved the Court to remit the case to Lord Stormonth Darling for proof, in respect that he was already cognisant of the matters in dispute between the parties. They submitted that this course was competent, and referred to the case of *Willing & Company* v. *Heys & Sons*, November 15, 1892, 20 R. 34. They further submitted that it was the most appropriate mode of trial in the circumstances of the case. Alternatively, they moved that the case should be sent to trial by jury.

The pursuer moved the Court to remit the case to the Sheriff Court, and argued that that was the convenient *forum* for trial of the case, looking especially to the nature of the proof which would have to be led. Alternatively, he moved the Court to send the case to trial by jury.

At advising—

LORD PRESIDENT—My opinion on the whole is that we shall best exercise our jurisdiction by dismissing this appeal and remitting this case back to the Sheriff. The action is one for a considerable sum, but at the same time the kind of question which has to be tried is peculiarly appropriate to a local tribunal, and the evidence is to be found in the place where the subjects are.

The appellants rest their appeal on one definite ground. They say that there has already been a good deal of procedure before a Lord Ordinary in a proceeding relating to the condition of this same manse. But then the appellants admit that the case must go to proof. Now, the procedure in the Outer House to which they refer has not been of the nature of proof. Remits were made to men of skill and reports obtained—a mode of inquiry quite appropriate to the proceedings before the Lord Ordinary—and the Lord Ordinary has decided the matter upon these reports. But it is admitted that the case must be opened afresh and tried on evidence yet to be given. That being so, I am disposed to think that there is no such high convenience in sending the case to a judge who has already had cognisance of the matters in dispute as there would at first sight appear to be, for his Lordship would require to divest his mind of the impressions formed in the course of the previous procedure.

I am also to some extent influenced by the consideration that if the case be tried in this court before a judge, an appeal to the House of Lords on the facts would be competent. That, although not conclusive, has a legitimate weight.

Accordingly I am not prepared to accede to the motion of the appellants that the case should be tried by a proof before the Lord Ordinary.

Now, neither party asks for jury trial; the appellants appealed for the definite purpose which I have discussed, and the respondent's motion is that we should dismiss the appeal. That last seems to me to be the proper course to take.

LORD ADAM—I am of the same opinion. The appeal has been brought here under the 40th section of the Judicature Act. The object of that section is to enable the party appealing to obtain a trial by jury. But the appellant in this case having come here says that was not the object of his appeal, but that the case ought to be tried by a judge. As the other side also say that a proof is the appropriate mode of trial I think we are entitled to send the case for proof. If it had been truly an action of damages there would have been more difficulty in not sending it to a jury. But that is not the nature of the case. The case is laid on the proposition that it is the duty of heritors to supply a habitable manse, and the action is for breach of that duty from 1884 onwards, and if that is established then there remains to be considered what is a fair rent during that period.

The question therefore is, assuming that there is to be a proof, who is to take it? To my mind the case ought never to have come from the Sheriff. It is entirely a question for a local inquiry before the Sheriff, viz., what has been the state of these subjects during a considerable period? In the whole circumstances I think that the case ought never to have been brought up from the Sheriff and that we should send it back.

LORD M'LAREN — I am reminded by counsel that in a former case I had expressed an opinion unfavourable to the practice of remitting advocations—for this is really an advocation although it is called an appeal—to the Sheriff. The ground of

that opinion is, that while the Sheriff Courts by their original constitution had unlimited jurisdiction in personal actions, the Legislature had thought fit to restrict that jurisdiction by providing that it should only exist concurrently with a right in either party to remove the case to the Court of Session for jury trial if the case be of the value of forty pounds. If the question were open I should doubt whether this Court had the power in such cases to remit to the Sheriff. But it has been decided in a very authoritative way that this course may be taken. I agree that the circumstances of this case are such as to render it more suitable for investigation before the local tribunal rather than the Court of Session because of the entirely exceptional character of the case, and because of its affinity to cases arising under the Act 31 and 32 Vict. cap. 96 in which the judge is final on the facts. Neither party desires that the case should be sent to a jury, and we cannot, I think, be wrong in taking the course which will make the decision on the facts final, at all events in the Court of Session.

LORD KINNEAR—I agree with your Lordship in the chair.

The Court remitted the case to the Sheriff for proof.

Counsel for the Pursuer—C. S. Dickson—Dewar. Agents—Cornillon, Craig, & Thomas, S.S.C.

Counsel for the Defenders — Graham Murray, Q.C. — Maconochie. Agents — Mackenzie, Innes, & Logan, W.S.

Thursday, February 15.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MACKENZIE *v.* LUCAS & AIRD.

Process—Interlocutor Ordering Proof—Reclaiming-Note within Six Days—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 28—*Act of Sederunt,* 11*th July* 1828—*Act of Sederunt,* 20*th July* 1853.

The Court of Session Act 1868, sec. 28, provides that any interlocutor by a Lord Ordinary ordering proof "shall be final unless within six days from its date the parties or either of them shall present a reclaiming-note against it to one of the Divisions of the Court."

Upon 30th January a Lord Ordinary "allowed parties a proof of their respective averments on record on a day to be afterwards fixed."

The Court rose for recess upon 3rd February, and met again upon Tuesday 13th February. On 12th February the pursuer boxed a reclaiming-note to the Second Division against the Lord Ordinary's interlocutor. *Held* that the reclaiming-note was incompetent.

The Act of Sederunt, 11th July 1828, for carrying out the provisions of the Judicature Act 1825 (6 Geo. IV. cap. 12), provides—"79. It is declared that where the twenty-one days allowed by the statute for presenting a note reclaiming against an interlocutor of a Lord Ordinary in the Outer House expire during vacation or recess, the reclaiming-days continue open till the first box-day in the vacation; or if they expire during the recess, the reclaiming-days shall continue open till the box-day in the recess; or if they expire after the box-day in the recess, they shall continue open till the first sederunt-day after the recess."

The Court of Session Act 1850 (13 and 14 Vict. cap. 36), sec. 11, limits reclaiming-days to ten except for judgments on the merits and decrees in absence.

The Act of Sederunt, 20th July 1853, following upon the Court of Session Act 1850, provides "That where the ten days therein mentioned expire during vacation or during any recess of the Court, they shall continue open till the first box-day in the vacation or till the box-day in the recess; or if they expire after the box-day in the recess, they shall continue open till the first sederunt-day after the recess."

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 28, provides that a reclaiming-note against an interlocutor of the Lord Ordinary ordering proof must be presented within six days from the date of the interlocutor.

Alexander Mackenzie, labourer, Fortrose, sued Lucas & Aird, contractors, Fort William, for damages for personal injuries.

Upon 16th January 1894 the Lord Ordinary closed the record, and appointed issues for the trial of the cause to be adjusted on 23rd inst. Upon 30th January he pronounced this interlocutor—"Dispenses with the adjustment of issues: Allows the parties a proof of their respective averments on record on a day to be afterwards fixed." The Court rose for recess upon Saturday 3rd and sat again upon Tuesday 13th February.

Upon 12th February the pursuer boxed a reclaiming-note against the interlocutor of 30th January.

The defenders objected to the competency of the reclaiming-note, and argued—This note had not been timeously presented within six days. It was true that the six days expired in vacation, but the clerk's office was open during a part of that time. The note should have been presented to the clerk on the first day the office was open, and that would have been compliance with the provisions of the statute. The note could have been boxed on the earliest opportunity, as lodging the principal note with the clerk was the most important part of duty in "presenting" the note—*Bain, &c.* v. *Allan, &c.*, February 29, 1884, 11 R. 650. The relaxations which had been granted as to lodging reclaiming-notes on twenty-one days' and ten days' interlocutors had been given by special Acts of Sederunt—11th July 1828 and 20th July 1853—and could not