"The minister admits that the trustees plea of prescription is sound, unless it appears that the valuation of 1805 is *ex facie* invalid—*Kinloch* v. *Bell*, 5 Macph. 360. No minute of admissions has been adjusted, and neither party asked for proof. It is not denied that the valuation of 1805 has been regularly acted on.

"The question depends on the decreet of valuation, dated December 4, 1805, obtained in an action raised at the instance of the Reverend Dr Alexander Duncan of Balkaithly, the first calling of which was upon June 5, 1805. That decreet contains the valuation of £35, 8s. 6d., on which Walter Irvine's trustees now found. The minister objects that the valuation is *ex facie* void, because, first, no valuation of that date can be valid unless the minister has been duly made a party to the cause, and in the process of 1805 the minister was not originally called and was not subsequently sisted.

"Nowadays unless the charge is vacant the minister is always called, and if the charge is vacant the Moderator of the Presbytery is called and the minister will be sisted on appointment—Erskine's Institutes ii, 10, 35; *Shaw Stewart* v. *Brown*, January 31, 1851, 13 D. 556; Juridical Styles of 1828, vol. iii, pp. 467, 471. In older practice it has been held sufficient if the minister's interests were represented by the titulars or others—*Heritors of Old Machar*, 1870, 8 Macph. (H.L.) 168; *Hay*, 113 R. 585.

"In this case it appears from the decreet that when the process was raised the charge was vacant; that the Moderator of the Presbytery was called; and that on the charge being filled up the minister appeared at the examination of witnesses examined before a Commissioner appointed by the Court, and cross-examined the witnesses Robert Edmond and John Duncan, examined for Dr Duncan of Balkaithly, the pursuer of the action. But the minister points out in this action that it is not stated that his predecessor who thus took an active part in the valuation proceedings of 1805 was ever formally sisted as a party. It appears to me that the legal presumption *rite et solemniter actum* applies—*Heritors of Old Machar*, February 28, 1868, 6 Macph. 504, *per* Lord Curriehill, 534. The minister would not have been entitled to cross-examine unless as a party to the cause. The valuation has been regularly acted on since 1805. In a process of augmentation, modification, and locality raised in 1812 the Lord Ordinary adjusted a scheme in which the teind of the lands of Balkaithly was stated at £35, 8s. 6d., the amount of the 1805 valuation, and in the subsequent locality this finding was given effect to. I may add that Lord Barcaple, in *Kinloch* v. *Bell*, 5 Macph. 360, called Lord Robertson, the Lord Ordinary in the 1805 valuation, 'a great authority on such questions.'

"The minister also questions the validity of the 1805 valuation on the ground that it appears *ex facie* that the valuation was made on a wrong principle. When the valuation was made the lands had been out of lease from the previous Martinmas—that is, November 1804—and the two witnesses already mentioned, John Duncan and Robert Edmond, deponed in answer to the minister that, although the rent under the lease had only been £150, the land would then let for £250. The minister says that the Court obviously went wrong in preferring the rent under an expired lease to the rent which on the evidence under cross-examination of the proprietor's own witnesses could then have been got—Ersk. ii, 10, 32; Connell, i, 183 to 185.

"This objection is no answer to the plea of prescription. Suppose the Court erred in fact or in law, or in both, the decree might be voidable but it would not be void. But it does not follow that any mistake was made. The Court might well prefer the actual rent charged and paid up till six months before the action was raised to a rent involving a rise of £100, about which two witnesses speaking in a period of Napoleonic fluctuations, and of whose capacity to judge the Court may have had a poor opinion, chose to give a speculative opinion for which no reasons are given."

The Lord Ordinary repelled the objections for the minister and sustained the surrender for the trustees.

Counsel for the Minuters—G. C. Steuart. Agents—J. C. & A. Steuart, W.S.

Counsel for the Minister—Chree. Agents—Wishart & Sanderson, W.S.

Friday, October 15.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

MATHIESON'S TUTOR *v.* AIKMAN'S TRUSTEES AND OTHERS.

Reparation—Landlord and Tenant—Negligence — Duty to Public — Invitation — Owner's Liability to Public where Premises Let to Various Tenants—Averments —Relevancy.

A message boy was sent to collect parcels from certain tenants in a tenement let out as offices to a number of business men and traders. The gate of a lift in the tenement was open, and thinking the lift was there the boy stepped into the well and was injured. His father, as his administrator-in-law, raised an action against the landlords of the tenement.

The pursuer averred—"For a considerable time before the said accident this said lift and safety gate were not working properly, the gate frequently failing to shut when the lift left the platform at the ground floor. This was due to the mechanism by which the said gate was operated having been allowed to go out of repair. The condition of the said lift apparatus and

mechanism, and the frequent failure of said safety gate to close when required, was well known to the defenders at the time of the accident, or should have been ascertained by them had the lift been frequently inspected in a regular and proper manner, as it should have been. It was the duty of the defenders on the lift going out of repair to have had it put in order immediately."

The Court *allowed* an issue, holding that under the averments the pursuer might be able to show that the defenders had remained responsible for the lift when letting out the various premises.

Observed (by the Lord President) that it would be the duty of the judge at the trial to stop any evidence as to faults in the construction of the lift.

John Mathieson, hide-buyer, 27 West Campbell Street, Glasgow, as tutor and administrator-in-law of his pupil son William Mathieson, raised an action against John James Pollock and others, Aikman's marriage-contract trustees, as the proprietors of the tenement of offices at 24 Melville Lane, Glasgow, and of hoists used in connection with said offices, concluding for damages for injuries sustained by his said pupil son.

The pursuer averred, *inter alia*—"(Cond. 2) The said tenement is let out in offices to business men and traders. In order to facilitate access to said offices the defenders have provided the premises with lifts or hoists, by means of which passengers and goods can be conveyed to any part of the same. Said lifts are not, as a rule, worked by attendants, but persons desiring to use them operate them for themselves. . . . (Cond. 3) Said lifts are constructed in such a way that when they are not in a position to be entered at the particular floor where the intending passenger happens to be, a safety gate which is designed to work in relation to the lift comes down and closes the well of the lift in such a way that no one can enter the lift space without being warned of the absence of the lift. The said safety door is designed to remain closed until the lift is at the particular platform where the door is, when it opens through the mechanism of the lift. Said precaution is absolutely necessary for the safe working of all lifts, and, in particular, of the lifts in question, especially at the ground floor of the said premises, because the close leading from the street to the entrance of the lifts is not lighted in any way except by the light which comes in through said close from the street. The street is nearly 20 feet away from the lift entrance, and there was a dim light at the lift entrance. The well of the lift was in shadow. (Cond. 4) The arrangements of said lift were known to the pursuer's son, who had occasion on several previous occasions to use said lift when on errands to different traders in said building. The pursuer's son was, in particular, well aware that when the said safety door was not closed he would find the lift in position to receive him, and might then safely enter the lift space. (Cond. 5) On 5th December 1908 the pursuer's son was in the service of the Sutton's Express Company, who sent him to collect some parcels from Messrs Maclaughlan, Pepper, & Company, who are tenants of the defenders in offices within said tenement at 24 Melville Lane. The pursuer's said son arrived at said tenement about two o'clock that afternoon intending to reach Messrs Maclaughlan, Pepper, & Company's office by the said lifts. On going up to the said lifts he observed that the door of the left-hand lift was fully open, and it seemed to him that the lift was there ready to receive him. Unfortunately he was deceived by the appearance of the lift well and by the obscurity of the place, and stepping into the space where the lift should have been fell down a depth of twelve feet in the well of the lift. There he lay for a considerable time until some girls hearing his cries gave the alarm and had him rescued and attended to. (Cond. 6) The accident above condescended on was due entirely to the fault and negligence of the defenders or those for whom they are responsible. For a considerable time before the said accident this said lift and safety gate were not working properly, the gate frequently failing to shut when the lift left the platform at the ground floor. This was due to the mechanism by which the said gate was operated having been allowed to go out of repair. The condition of said lift apparatus and mechanism, and the frequent failure of said safety gate to close when required was well known to the defenders at the time of the accident, or should have been ascertained by them had the lift been frequently inspected in a regular and proper manner, as it should have been. It was the duty of the defenders on the lift going out of repair to have had it put in order immediately, or at least to have placed an attendant in charge of it, or to have closed it up altogether until it had been repaired. The defenders were in fault in omitting to discharge these duties, and the accident to pursuer's son was due to said omission."

The pursuer pleaded—"(1) The pursuer's son having been injured through the fault of the defenders, is entitled to be compensated by them, and decree should be granted as craved."

The defenders pleaded that the action should be dismissed as the averments were irrelevant.

The pursuer proposed the following issue—"Whether on or about 5th December 1908, and in or about the premises at Melville Lane, Glasgow, owned by the defenders, the pursuer's son William Mathieson, residing with him at 27 West Campbell Street, Glasgow, was injured in his person through the fault of the defenders, to the loss, injury, and damage of the pursuer."

On 8th June 1909 the Lord Ordinary (SKERRINGTON) approved of the issue.

The defenders reclaimed, and argued—The pursuer's averments were irrelevant, because they had themselves averred that

the offices were let to tenants. It followed in the absence of averment to the contrary that the tenants were also the lessees of the lifts, and as such had the duty of maintenance—*Devlin* v. *Jeffray's Trustees*, November 19, 1902, 5 F. 130, 40 S.L.R. 92; *Keeney* v. *Stewart*, 1909 S.C. 754, 46 S.L.R. 546. (2) There was no specification in Cond. 6 as to how the mechanism of the gate went wrong, or of faulty construction —*Waterson* v. *Murray & Company*, July 1, 1884, 11 R. 1036, 21 S.L.R. 695. (3) On the pursuer's own averments his pupil son was guilty of contributory negligence—*Driscoll* v. *Commissioners of Burgh of Partick*, January 10, 1900, 2 F. 368, 37 S.L.R. 274; *Fleming* v. *Eadie & Son*, January 29, 1898, 25 R. 500, 35 S.L.R. 422.

Argued for the pursuer and respondent—The averments clearly implied and were on the supposition that the lift was in the control of the defenders and had not been let. There was further the averment that the lift had been out of control for some time, and that the defenders knew or ought to have known of this. These averments were sufficient to make a relevant case.

LORD PRESIDENT—I cannot say that I think this record is at all satisfactory. It is very vague, and leaves us to guess at things which ought to be more specifically stated, but I do not feel myself able absolutely to turn the case out of Court, because I think there is one averment, and one averment alone, which is relevant. The accident is said to have happened owing to the protecting gate of a lift not having been closed, and thereby allowing the boy who met with the accident to enter the well when the lift was not there.

The accident took place in a lift in premises which are said to be let to several tenants. The tenants are not enumerated, but one can easily see that they are a commercial class of tenants, because offices are mentioned; and the action is directed against the landlords. There is almost nothing said about the relation of the landlord and the tenants as regards these lifts, and nothing more is averred than that the offices were let and that the lifts were part of the premises. I think the pursuer's case is here faulty *in initio*, because the duty of keeping the premises in repair is a duty which is not upon the owner but upon the occupier, though if it can be shown that the landlord has retained control of this part of the premises, then there may be a duty upon him to the public. The next unsatisfactory matter is as regards the accident, for we are not told what the defect was. We are told of the result of the defect, namely, that the gate did not work properly, but we are not told why it did not work properly; and one thing is clear, that no averment is made as to the insufficiency of the lift as regards its construction. Therefore here it would be the duty of any judge who tried the case—and I say this because it is as well to make it clear before the trial—it would clearly be the duty of the judge to stop any evidence as to faults in the construction of the lift.

The only matter which I think makes the case relevant at all is that in Cond. 6 it is said that "For a considerable time before the said accident this said lift and safety gate were not working properly, the gate frequently failing to shut when the lift left the platform at the ground floor. This was due to the mechanism by which the said gate was operated having been allowed to go out of repair. The condition of said lift apparatus and mechanism, and the frequent failure of said safety gate to close when required, was well known to the defenders at the time of the accident, or should have been ascertained by them had the lift been frequently inspected in a regular and proper manner as it should have been." If the pursuer can show that the defect was well known to the defenders, and that they had taken over the responsibility for the gate, that is a possible ground of liability. The second branch of the averment, that it ought to have been known to them if they had inspected, really depends upon the proof on the first matter, because, of course, if they had not retained any duty as regards the lift they did not retain any duty to inspect; and it would never do to encourage the idea that a landlord who gives over his premises to a tenant and as part of the arrangement gives over contrivances and machines against which no fault of construction is averred, yet retains a liability in regard to third persons for accidents which may occur. I think that the pursuer upon the face of the record has a very uphill case, but still I think that we ought to approve of the issue.

LORD KINNEAR—I think that the case ought to go to a jury. I agree that it will be necessary for the pursuer to prove that when the tenement was let out, as he says, in offices to business men and traders, the proprietors still remained in the occupation and control of the lift, which was intended to supply the whole tenement and not any particular part of the tenement. Of course he must prove that the accident was due to the fault of the proprietors, and the only fault alleged is that they have failed to remedy a defect which they knew to exist, or which they were bound to know if they had performed the duty which is assumed to be imposed upon them of keeping the lift in good order. The proof of that duty of course depends upon satisfactory evidence upon the first part that they were really in the control of the lift.

LORD JOHNSTON concurred.

LORD M'LAREN was absent.

The Court adhered, refused the reclaiming note, and remitted to the Lord Ordinary to proceed.

Counsel for the Pursuer (Respondent)—M'Lennan, K.C.—Ingram. Agent—John Baird, Solicitor.

Counsel for the Defenders (Reclaimers)—M'Clure, K.C. — MacRobert. Agents — Graham Miller & Brodie, W.S.